

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE
OF JOHN LEWIS TILLER, DECEASED, PETI-
TIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 10, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH DISTRICT

ATLANTIC COAST LINE
RAILROAD COMPANY, a
Virginia corporation, Plaintiff,

v.

HATTIE MAE TILLER,
Executor of the Estate
of John Lewis Tiller,
Deceased, Defendant.

No. 5217

STIPULATION

It is hereby stipulated by and between counsel for the parties herein that, since the portions of the certified transcript of record designated by appellant herein to be printed as an appendix to its brief incorporate certain portions of the certified transcript of record which the appellee desires to be printed as an appendix to its brief, the parties hereto agree to print the following as a "Joint Appendix" to the briefs of both parties herein.

Dated at Richmond, Va., this 27th day of January, 1944.

J. VAUGHAN GARY,

Counsel for Appellee.

COLLINS DENNY, JR.,

Counsel for Appellant.

**JOINT APPENDIX TO BRIEFS OF APPELLANT
AND APPELLEE**

**IN THE
United States Circuit Court of Appeals
FOURTH CIRCUIT**

No. 5217

**ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, APPELLANT,**

v.

**HATTIE MAE TILLER, EXECUTOR OF JOHN
LEWIS TILLER, DECEASED, APPELLEE.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION.**

COMPLAINT

(Filed January 17, 1941)

1. Plaintiff is and has been duly appointed, qualified and acting executor of the Estate of John Lewis Tiller, Deceased, who died on March 21, 1940, as the result of injuries sustained as hereinafter described.

2. Before and at the time of the injuries sustained by plaintiff's decedent resulting in his death, all of which is herein complained of, defendant owned and operated a railroad extending through the State of Virginia and several

other states and was a common carrier engaged in commerce between the several states, territories, District of Columbia, and foreign nations; and the injuries complained of occurred while it was engaging in such commerce and while plaintiff's decedent was employed by defendant in such commerce, his duties being in furtherance of interstate and foreign commerce and directly, closely and substantially affecting such commerce. This action is brought by plaintiff for the benefit of the surviving widow and minor child, the dependents of the decedent, under and pursuant to the provisions of 45 U.S.C.A. Section 51-60, and acts amendatory thereto, known as the Federal Employers Liability Act.

2. On or about March 20, 1940, the defendant was engaged in shifting, coupling, and uncoupling cars from one train to another on its tracks in or about the South Richmond stockyards near Clopton Road, Stop 5, Petersburg Pike, Chesterfield County, Virginia, in order to make up the cars for a southbound freight train.

3. While defendant was thus engaged, plaintiff's decedent was performing his duties as an employee of defendant and was inspecting the seals on various freight cars and performing other services.

4. Defendant's officers, agents and servants, other than plaintiff's decedent, acting within the scope of their employment, then and there performed the operations in which they were engaged in a careless, reckless, unlawful and negligent manner in that while they knew or in the exercise of ordinary care should have known full well the position of the decedent and the work in which he was engaged, they failed to keep a proper lookout for him, to give proper signals warning of the approach of the train, to keep the head car properly lighted, or lighted at all, to warn deceased of a hitherto unprecedented and unexpected change in the manner of shifting the cars although they knew full well that such a change would place him in a position of extreme danger, if he were not so warned, to operate their train, engine and cars in a careful and prudent manner under the

circumstances then and there existing, to furnish deceased a reasonably safe place in which to work, and in other respects and particulars, by reason of and as a result of all of which a car propelled by defendant's engine and operated by its crew ran up against, struck, dragged, ran over, crushed and mangled decedent, causing him severe and grievous injuries from which he suffered excruciating agony and pain for many hours during which he was conscious until his resulting death on March 20, 1940. After the deceased was thus injured, bleeding profusely and in a severely critical condition, defendant's servants, agents, officers and employees did not exercise ordinary care in providing prompt and adequate medical treatment and attention for deceased, but on the contrary carelessly and negligently left deceased for some hours unattended by medical doctors and hospitals and failed to procure an ambulance, all of which caused great loss of blood and suffering to deceased, and all of which failures to exercise ordinary care in an emergency contributed to his death. Prior to these injuries, decedent was a strong, able-bodied man capable of earning and actually earning \$185.00 a month. At the time of his death, he was fifty-one (51) years of age. Decedent's dependents, who are his widow and minor child, have also suffered great pecuniary loss and damage as a result of his fatal injuries and death.

5. This action is commenced within one year from the date of decedent's fatal injuries.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of FIFTY THOUSAND (\$50,000.00) DOLLARS and costs.

ANSWER

(February 6, 1941)

FOR A FIRST DEFENSE.

(a) The defendant admits the allegation of paragraph one of the Complaint.

(b) Defendant admits that it is a common carrier by railroad, engaged in interstate commerce; it admits that the injuries complained of occurred while defendant was engaged in such commerce and while plaintiff's decedent was employed by it in such commerce.

(c) Defendant alleges that at or about 7 p. m. o'clock on March 21, 1940, it was engaged in shifting, coupling and uncoupling cars from one train to another and from one track to another on its tracks in its railroad yards just south of the City of Richmond, in Chesterfield County, Virginia, known as Clopton Yards, in order to make up a regular southbound freight train. One of the regular duties of plaintiff's decedent was to ride and protect said southbound freight train. Defendant is without knowledge sufficient to permit it to affirm or deny whether at the time plaintiff's decedent received the injuries of which complaint is made, he was inspecting the seals on the various freight cars, or was actively performing other services, or was preparing to perform services. Defendant, on the other hand, avers that there were no eye-witnesses to the accident on which plaintiff's decedent was killed; that whether he was killed in alighting from a moving train and stepped immediately in the path of a cut of cars moving in the opposite direction, or whether he was standing upon the tracks upon which said cut of cars was approaching, or whether he had fallen upon said tracks from a moving car before he was struck by said cut of cars are all matters of speculation, guess and random judgment, and can form no basis for legal liability.

(d) Defendant admits that while it was thus making up said southbound freight train, plaintiff's decedent was struck by a moving cut of cars in the said railroad yard, but it denies that it, its officers, servants or employees other than the plaintiff's decedent were guilty of any negligence whatsoever in the premises, and it denies each and every allegation of negligence contained in paragraph four of the Complaint.

FOR A SECOND DEFENSE.

Defendant alleges that plaintiff's decedent assumed all risks normally and necessarily incident to his employment. He knew that the shifting of cars and the making up of a train in a railroad yard after dark is attended by much danger, and the risks normally and necessarily attendant on such operations were assumed by plaintiff's decedent. The injuries and death of plaintiff's decedent were the proximate result of a risk thus assumed by him.

FOR A THIRD DEFENSE.

While defendant denies that its officers, servants or employees other than plaintiff's decedent were guilty of any negligence whatsoever, nevertheless, defendant alleges that if plaintiff's decedent was negligently injured as alleged in the Complaint, the plaintiff's decedent, himself, was guilty of contributory negligence in that, knowing that he was at work in a place of continual danger, he failed to keep a proper lookout for his own protection and failed to heed the approach of cars being moved by an engine, but, on the contrary, carelessly and negligently permitted himself to be struck by a car so propelled, and that this negligence on the part of plaintiff's decedent proximately contributed to his injuries and death; or that plaintiff's decedent negligently alighted or fell from a moving train immediately in the path of a cut of cars moving in the opposite direction.

ORDER FILING AMENDED COMPLAINT

(Entered and filed June 1, 1943)

This day came the plaintiff, by counsel, and moved the Court for leave to file her amended complaint in this action, which motion was opposed by defendant upon the ground that the allegation of a violation of the Boiler Inspection Act (45 U. S. C. A., Section 22, *et seq.*), made in the amended complaint, raises as a ground of action a new and different state of facts from those alleged in the original complaint;

seeks to introduce a new cause of action; and seeks a departure from law to law; all after the expiration of the limitation period of three years prescribed by the Federal Employers Liability Act (45 U. S. C. A., Section 56); and upon the further ground that said limitation is a limitation on the right of action itself and the Court is accordingly without jurisdiction to allow the amendment, and was argued by counsel.

The Court being of the opinion that the ends of justice require that leave to file said amended complaint be given, it is ordered that the amended complaint of the plaintiff be filed herein, leave being given to defendant to file such responses to said amended complaint within twenty days from this date, as it may be advised.

NOTICE TO FILE AMENDED COMPLAINT

(Filed June 1, 1943)

To Collins Denny, Jr., Esq.,
Travelers Building,
Richmond, Virginia.

Dear Sir:

Please take notice that I shall move this Court at the Federal Court Room, United States Post Office Building, Richmond, Virginia, on the 28th day of May, 1943, at ten o'clock in the morning of that day, or as soon thereafter as I may be heard, for leave to file the attached amended complaint.

J. VAUGHAN GARY,
Of Counsel for Plaintiff,
State-Planters Bank Building,
Richmond, Virginia.

Due, legal and timely service of the above notice is hereby accepted and acknowledged this 24 day of May, 1943.

COLLINS DENNY, JR.,
Of Counsel for Defendant.

AMENDED COMPLAINT

(Filed June 1, 1943)

1. Plaintiff has been duly appointed, has qualified and is now acting as Executor of the Estate of John Lewis Tiller, deceased, who died on March 22, 1940, as the result of injuries sustained as hereinafter described.

2. Before and at the time of the injuries sustained by plaintiff's decedent resulting in his death, which is the subject of this complaint, defendant owned and operated a railroad extending through the State of Virginia and several other States and was a common carrier engaged in commerce between the several States, Territories, District of Columbia, and foreign nations; and the injuries complained of occurred while it was engaging in such commerce and while plaintiff's decedent was employed by defendant in such commerce, his duties being in furtherance of interstate and foreign commerce and directly, closely and substantially affecting such commerce. This action is brought by plaintiff for the benefit of the surviving widow and minor child, the dependants of the decedent, under and pursuant to the provisions of 45 U. S. C. A., Section 51-60, and acts amendatory thereto, known as the Federal Employers Liability Act.

3. On or about March 20, 1940, the defendant was engaged in coupling, uncoupling and shifting cars from one train to another on its tracks in or about its yard at or near the South Richmond stockyards near Clopton Road, Stop 5, Petersburg Pike, Chesterfield County, Virginia, in order to make up the cars for a southbound freight train.

4. While defendant was thus engaged, plaintiff's decedent was performing his duties as an employee of defendant and was inspecting the seals on various freight cars and performing other services.

5. Defendant then and there violated the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A., Section 22, *et seq.*, by using or permitting to be used a locomotive which

was in improper condition and unsafe to operate in the service, and the condition of which constituted unnecessary peril to life and limb, in that it did not have the proper lights; and defendant then and there also violated the rules and regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of the said Federal Boiler Inspection Act in that it used a locomotive in yard service between sunset and sunrise which did not have the proper lights as prescribed by the said rules; and the defendant's officers, agents and servants, other than plaintiff's decedent, acting within the scope of their employment, then and there performed the operations in which they were engaged in a careless, reckless, unlawful and negligent manner in that while they knew, or in the exercise of ordinary care should have known full well, the position of the decedent and the work in which he was engaged, they failed to keep a proper lookout for him, to give proper signals or warnings of the approach of the train, to keep the locomotive and/or the head car properly lighted, or lighted at all, to warn decedent of a hitherto unprecedented and unexpected change in the manner of shifting the cars, although they knew full well that such a change would place him in a position of extreme danger, if he were not so warned, and failed to operate their train, locomotive and cars in a careful and prudent manner under the circumstances then and there existing, and to furnish decedent a properly lighted and a reasonably safe place in which to work, and in other respects and particulars, by reason of and as a result of all of which violations of law and negligence on the part of the defendant and its said officers, agents and servants, a car propelled by defendant's said locomotive and operated by its crew ran up against, struck, dragged, ran over, crushed and mangled decedent, causing him severe and grievous injuries from which he suffered excruciating agony and pain for many hours during which he was conscious until his resulting death on March 22, 1940. Prior to these injuries, decedent was a strong, able-bodied man capable

of earning and actually earning \$185.00 a month. At the time of his death, he was fifty-one (51) years of age. Decedent's dependents, who are his widow and minor child, have also suffered great pecuniary loss and damage as a result of his fatal injuries and death.

6. This action is commenced within one year from the date of decedent's fatal injuries.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of FIFTY THOUSAND (\$50,000.00) DOLLARS and costs.

ANSWER TO AMENDED COMPLAINT

(Filed June 18, 1943)

FOR A FIRST DEFENSE.

Defendant says that the allegations of the first two clauses of paragraph 5 of the Amended Complaint, to-wit, the clauses reading as follows:

“5. Defendant then and there violated the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A., Section 22, *et seq.*, by using or permitting to be used a locomotive which was in improper condition and unsafe to operate in the service, and the condition of which constituted unnecessary peril to life and limb, in that it did not have the proper lights; and defendant then and there also violated the rules and regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of the said Federal Boiler Inspection Act in that it used a locomotive in yard service between sunset and sunrise which did not have the proper lights as prescribed by the said rules;”

seek to introduce new subject matter as a new cause of action; raise as a cause of action a new and different state of facts from those alleged in the original complaint; seek a departure from law to law; all after the expiration of

the limitation period of three years prescribed by the Federal Employer's Liability Act, as amended August 11, 1939 (45 U. S. C. A., Section 56); defendant says that said Statute, as amended, establishes as a condition precedent that action be brought within the period of three years and said limitation is a limitation on the right of action itself, and this Court is without jurisdiction to consider this new subject matter and this new cause of action.

WHEREFORE, defendant moves to strike said allegations from the Amended Complaint and to dismiss this new alleged cause of action. And, as permitted by Rule 12 (b) of the Federal Rules of Civil Procedure, defendant incorporates this defense and motion in its answer.

FOR A SECOND DEFENSE.

Defendant says that the first two clauses of paragraph 5 of the Amended Complaint, quoted in the first defense, seek to introduce new subject matter as a cause of action; raise as a ground of action a new and different state of facts from those alleged in the original complaint; seek a departure from law to law, all after the expiration of the limitation period of three years prescribed by the Federal Employer's Liability Act, as amended (45 U. S. C. A., Section 56). Any right of action predicated on this new state of facts is, accordingly, barred.

WHEREFORE, defendant moves to strike said allegation from the Amended Complaint and to dismiss this new alleged cause of action.

FOR A THIRD DEFENSE.

1. Defendant admits the allegations of paragraph 1 of the Amended Complaint.

2. Defendant admits the allegations of paragraph 2 of the Amended Complaint.

3. Defendant admits the allegations of paragraph 3 of the Amended Complaint.

4. Defendant is without knowledge sufficient to permit it to affirm or deny whether at the time plaintiff's decedent received the injuries of which complaint is made, he was inspecting the seals on the various freight cars, or was actively performing other services, or was preparing to perform services. Defendant, on the other hand, avers that there were no eye-witnesses to the accident in which plaintiff's decedent was killed; that whether he was killed in alighting from a moving train and stepped immediately in the path of the cut of cars moving in the opposite direction, or whether he was standing upon the tracks upon which said cut of cars was approaching, or whether he had fallen upon said tracks from a moving car before he was struck by said cut of cars are all matters of speculation, guess and random judgment, and can form no basis for legal liability.

5 (a) The first two clauses of paragraph 5 of the Amended Complaint, quoted in the first defense, alleged, for the first time, a cause of action which did not accrue within three years next before the commencement of action on that cause of action.

5 (b) Defendant admits that while it was making up its southbound freight train on the evening in question, plaintiff's decedent was struck by a moving cut of cars in defendant's Clopton Yards, but it denies that it, its officers, servants or employees violated the provisions of the Federal Boiler Inspection Act (45 U. S. C. A., Sec. 22, *et seq.*) or that it violated the Rules and Regulations prescribed by the Interstate Commerce Commission, pursuant to the provisions of said Federal Boiler Inspection Act, in the respects alleged; it says that if in any of the respects alleged it violated said last mentioned Act or said Rules and Regulations, there was no causal connection between such violation and injuries sustained by plaintiff's decedent and his death; and it denies that it, its officers, servants or employees, other than plaintiff's decedent, were guilty of any negligence whatsoever in the premises, and it denies each and every allegation of negligence contained in paragraph 5 of the Amended Complaint.

6. Defendant denies that this action, so far as it relates to any cause of action for a violation of the provisions of the Federal Boiler Inspection Act, or for a violation of any Rule or Regulation prescribed by the Interstate Commerce Commission, pursuant to the provisions of said Act, was commenced within one year from the date of decedent's fatal injury.

FOR A FOURTH DEFENSE.

While defendant denies that its officers, servants or employees, other than plaintiff's decedent, were guilty of any negligence whatsoever, nevertheless, defendant alleges that if plaintiff's decedent was negligently injured, as alleged in the Amended Complaint, plaintiff's decedent, himself, was guilty of contributory negligence in that, knowing that he was at work in a place of continual danger, he failed to exercise reasonable care in keeping a proper lookout for his own protection and failed to exercise reasonable care in heeding the approach of cars being moved by an engine, but, on the contrary, carelessly and negligently permitted himself to be struck by a car so propelled; and that this negligence on the part of plaintiff's decedent proximately contributed to his injuries and death; or that plaintiff's decedent negligently alighted or fell from the moving train immediately in the path of the cut of cars moving in the opposite direction; or that plaintiff's decedent negligently fell or slipped while trying to board the car by which he was struck.

MOTION TO STRIKE DEFENSES

The plaintiff moves the Court as follows:

1. To strike out the first and second defenses and paragraphs 5(a) and 6 of the third defense asserted by defendant in its answer to the amended complaint heretofore filed herein upon the grounds that they fail to state legal defenses; that plaintiff's amended complaint does not seek

to introduce new subject matter as a cause of action, raise as a ground of action a new and different state of facts from those alleged in the original complaint or seek a departure from law to law; that no right of action asserted in the amended complaint is barred by any statute of limitation; that any and all claims asserted in the amended complaint arose out of the conduct, transaction or occurrence set forth in the original complaint and the amendment relates back to the date of the original complaint; and that the subject matter and state of facts to which defendant objects in his answer were presented and argued by counsel for the plaintiff and counsel for the defendant in briefs filed herein before the Supreme Court of the United States within three years from the day the cause of action alleged by the plaintiff accrued.

2. To strike out the fourth defense asserted by the defendant in its said answer upon the ground that it fails to state a legal defense; and that the violation by the defendant of the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A., Section 22, *et seq.*, a statute enacted for the safety of employees, contributed to the injury and death of plaintiff's decedent and bars the defendant from asserting the alleged contributory negligence of the plaintiff's decedent as a defense.

MEMORANDUM OPINION OF THE COURT

(Filed July 23, 1943)

After careful consideration of the oral and written arguments of counsel, I have concluded that the motions of the defendant to strike those portions of the amended complaint which allege violations of the Federal Boiler Inspection Act and rules and regulations prescribed by the Interstate Commerce Commission, should be overruled.

The Federal Employers Liability Act gives to employees of common carriers by railroad engaged in interstate commerce a cause of action against such carrier for damages

for injury or death resulting from the negligence of any employee of any such carrier or from any defect or insufficiency, due to negligence, in its cars, engines or other equipment. The original complaint states that the action is brought under and pursuant to said Act. Under the circumstances, the original complaint asserted a cause of action as broad as that given by the Act under which the complaint was filed, and the plaintiff became entitled to invoke the negligence specified in the Act, whether that of the employees of the carrier or that arising by reason of any defect in its equipment. And the cause of action asserted in the original complaint is not to be restricted by statements made in the complaint which are not only unnecessary to a statement of the cause of action but might have been omitted altogether until the plaintiff might have been required to make a more definite statement of the acts of negligence relied upon for a recovery.

My conclusions are that the cause of action conferred upon the plaintiff by the Federal Employers Liability Act was invoked in her original complaint; that the amended complaint does not state a new or different cause of action from that asserted under the original complaint; that the new or added portions of the amended complaint merely amplify the particulars of negligence which were unnecessarily placed in the original complaint; and that the motions of the defendant to strike certain portions of the amended complaint should be overruled.

A sketch of an order carrying out the views here expressed may be presented after reasonable notice.

**ORDER OVERRULING DEFENDANTS MOTION TO
STRIKE CERTAIN PORTIONS OF
AMENDED COMPLAINT**

(Entered and filed August 17, 1943)

Upon consideration of defendant's motions set forth in the first and second defenses of its answer to plaintiff's

amended complaint to strike certain portions of said complaint, the Court, having considered the oral and written arguments of counsel, being of the opinion that plaintiff's amended complaint does not state a new or different cause of action from that asserted under the original complaint, and that the new or added portions of the amended complaint merely amplify the particulars of negligence which were unnecessarily placed in the original complaint, it is ordered that the said motions of the defendant be overruled, and the Court being further of the opinion that plaintiff's motion to strike paragraphs 5 (a) and 6 of defendant's third defense should be granted, it is ordered that paragraphs 5(a) and 6 of defendant's third defense be stricken from its answer to plaintiff's amended complaint.

And plaintiff, having moved that she be permitted to withdraw her motion to strike the fourth defense set up in the amended answer, she is permitted to withdraw the same, leave being given to the plaintiff to renew the said motion or otherwise to raise the said question, if, in the future, she be so advised.

REPORTERS TRANSCRIPT

MRS. HATTIE MAE TILLER, the plaintiff, being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

Q. Mrs. Tiller, are you the wife of John Lewis Tiller?
A. Yes.

Q. When were you married? A. November 22, 1930.

.

Q. Have you any children, Mrs. Tiller? A. Yes, sir, one.
Q. A boy or girl? A. A boy.

.

Q. How old is he? A. Eight years old.
Q. By whom was your husband employed? A. By the Atlantic Coast Line Railroad.

Q. How long had he been employed by that company?
A. Sixteen years.

Q. What was his assignment or title, if any, with the company? A. Sergeant of Police.

Q. What was the date of his death? A. March 22, 1940.

Q. Where did he die? A. In Grace Hospital.

Q. Do you recall what time he left his home on the day of March 20, 1940? A. About six o'clock.

Q. Morning or evening? A. Evening.

Q. When and where did you see him next? A. I saw him in Grace Hospital next. I was called on the evening of March 20th about 8:30, saying that my husband had been badly hurt on the road.

Q. Did you go to the hospital? A. I went to the hospital immediately and his condition was such that night that they did not permit me to see him.

Q. When did you see him the next time after he left home? A. I saw him the following morning.

Q. Was he conscious? A. Yes, he was conscious and suffering intensely, I should say.

.

Q. Was that before or after the amputation of his leg?
A. That was after the amputation of his leg because he told me they had amputated his leg.

Q. Did you see him after the second operation, Mrs. Tiller? A. Yes.

Q. Was that after a further amputation? A. That was after they had amputated his arm.

Q. What was the state of your husband's health previous to this accident? A. It was very good.

Q. His hearing? A. Very good.

Q. How about his sight? A. Very good.

Q. Was he a man addicted to strong drink? A. Not at all. He did not drink.

Q. Was he a large or small man? A. He was a large man.

Q. Do you recall what his weight was? A. It was around 200.

Q. What was his height? A. Six feet.

Q. Tell the Jury, Mrs. Tiller, what was your husband's age in 1940, March 20th? A. He was fifty-one.

Q. Do you know his birthday? A. July 13, 1888.

.

Q. Is this the flashlight that belonged to your husband? I hand it to you, Mrs. Tiller, and ask you if you can identify it as a flashlight belonging to your husband?

.

(The flashlight was filed and marked Plaintiff's Exhibit No. 1)

By Mr. SATTERFIELD:

Q. When Mr. Tiller usually went out on this run what time would he return home? A. Around five o'clock in the morning.

Q. Was his work regular, the assignment that he had on the railroad company? A. Well, his work was irregular but he had been on this run the greater part of the years he had been with them.

.

Q. Mrs. Tiller, will you please tell the gentlemen of the jury what was the salary or the remuneration which the Coast Line paid your husband monthly? A. \$185.00 a month.

Q. Was he made by the company any allowances for expenses? A. Yes, he had an expense account.

Q. Do you know what that amounted to monthly? A. That amounted to anywhere from \$18 to \$25, I should say.

.

Q. Was that in addition to his salary? A. Yes.

Q. So he received either \$185 a month plus \$18 or some months \$185 a month plus \$25? A. Yes.

Q. And I imagine sometimes in between? A. Yes.

Q. What did he contribute to the support of you and your

infant child? A. Well, he gave us practically everything he made except what he actually needed.

Q. Could you give the jury some idea as to what figure he contributed each month? A. I should say approximately \$150.

Q. You qualified as the executor of the estate of your husband, did you not? A. Yes.

Q. And you are the plaintiff in these proceedings? A. Yes.

CROSS EXAMINATION

By MR. DENNY:

Q. Mrs. Tiller, the expense account to which you referred, I take it, covered his meals and his lodging and other expenses while away from home? A. Yes.

Q. It was simply a reimbursement of money he had to spend? A. Yes.

REDIRECT EXAMINATION

By MR. SATTERFIELD:

Q. You stated a moment ago that you were at the hospital all the time he was there. Did you see him from time to time while he was there? A. Yes, I saw him all the time he was in the hospital but I couldn't go in. I would just go to the room and look in.

Q. How many times did you go in and talk to him? A. I only talked to him twice.

Q. Those occasions were when? A. Well, the morning after he was hurt was the first time and he was too ill all day to talk to him and I talked to him that night. He was conscious that night as late as twelve o'clock.

Q. Was he suffering at that time? A. Yes indeed, and he knew me as late as twelve o'clock that night and called my name.

DR. J. F. PARKINSON, called as a witness by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. GARY:

Q. Dr. Parkinson, are you a practicing physician? A. Yes.

Q. Were you connected with Grace Hospital on March 20, 1940? A. Yes.

Q. In what capacity? A. As interne.

Q. Did you see Mr. John Lewis Tiller who was brought into the hospital that night? A. Yes, sir.

Q. Do you have with you the charts from the hospital showing his condition and the treatment? A. Yes.

Q. Did you examine Mr. Tiller when he was brought in? A. Yes.

Q. Will you state to the jury what his condition was when he was brought into the hospital? You may refer to the chart of the hospital and any notes that were made with reference to it. First, will you state what time he was brought into the hospital? A. Mr. Tiller was admitted to the hospital, according to the record, at 8:10 p. m. on March 20, 1940. I saw him on admission. At that time he was in much pain and in extreme shock and the people who brought him in in an ambulance stated that he was struck by a train just prior to admission. He was a well developed and well nourished white male of approximately fifty-two years of age, in extreme shock and in extreme pain and bleeding from compound fractures of left arm and left thigh. His head and neck showed nothing except bruises about the face and head. He had what I interpreted as fractures of the left ribs which were not causing any extreme difficulty at that time. Otherwise his body was in fairly good condition except for his extremities which showed compound fracture of the left thigh with almost complete section of the vessels, nerves and muscles. This was in the lower third of his thigh above his knee. He also had compound fractures of the left arm just above the elbow and this compound fracture also had destroyed the majority of the tissue beneath the skin.

At 11 o'clock his condition had improved somewhat so that he could be removed to the operating room and in the operating room Dr. Beath, who was the surgeon attending Mr. Tiller, amputated his left thigh and reduced the fracture of the right ankle and cleaned the lacerations of his left arm.

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A. Yes. Following that a blood transfusion was given and Mr. Tiller was returned to bed. The left arm was only cleaned to remove the tissue which was contaminated at that time. No extensive operation was done on the left arm due to his physical condition.

The next day he was returned to the operating room and at that time the left arm was amputated above the elbow and at the same time we redressed the stump of his left thigh amputation and on redressing in the operating room there was a small amount of discharge and a faint foul sweet odor which suggested the possibility that he was getting gas gangrene infection in this thigh.

After the first operation he was given the usual anti-gas serum and treatment for tetanus. As soon as we found some suspicion of gas gangrene we immediately started therapeutic doses of the serum for gangrene and as soon as his nausea was over we started him on sulfanilimide.

He received three blood transfusions during the period he was in the hospital. Then Mr. Tiller's condition grew much worse in the afternoon after his arm was amputated, his temperature began to rise rapidly and he seemed to be in very poor condition. This continued down hill until 4:45 A. M. of the 22nd of March when Mr. Tiller ceased to breath.

Q. He died on March 22nd at 4:45 A. M.?

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MR. SATTERFIELD: At this point we should like to offer in evidence the photograph which I hand counsel for the defense.

MR. DENNY: That is agreed.

MR. SATTERFIELD: And to have it marked Plaintiff's Exhibit No. 2.

(This photograph was filed and marked Plaintiff's Exhibit No. 2)

MR. SATTERFIELD: We also ask at this time to introduce in evidence the rules of the Interstate Commerce Commission which, by stipulation and agreement, counsel for the defense have agreed we might introduce.

MR. DENNY: Do you desire to introduce the whole thing or just specific rules?

MR. SATTERFIELD: Any rule that is applicable in this hearing.

THE COURT: Rules 129 and 131?

MR. GARY: Yes, that is right.

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THE COURT: Rules 129 and 131 are admitted in evidence.

MR. SATTERFIELD: We ask leave at this time to read them into the record.

THE COURT: All right.

MR. SATTERFIELD: "Interstate Commerce Commission, Bureau of Locomotive Inspection. Laws, Rules and Instructions for inspecting and testing of steam locomotives and tenders and their appurtenances.

"Rule No. 129. (a) Locomotives used in road service—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive, who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere a dark object as large as a man of average size, standing erect, at a distance of at least 800 feet ahead and in front of such headlight and such headlight must be maintained in good condition.

"(b) Each locomotive used in road service which is regularly required to run backward for any portion of its trip except to pick up a detached portion of its train or in making terminal movements shall have on its rear a headlight which shall meet the foregoing requirements.

"(c) Such headlight shall be provided with a device

whereby the light from same may be diminished in yards and at stations or when meeting trains.

"(d) When two or more locomotives are used in the same train the leading locomotive only will be required to display a headlight.

"Rule 131: Locomotives used in yard service—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of a locomotive under the conditions, including visual capacity set forth in Rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight and such headlight must be maintained in good condition."

If Your Honor please, at this juncture we also offer in evidence a report of this accident to the State Corporation Commission by the Superintendent of Transportation of the Coast Line as required by law.

MR. DENNY: If the Court please, we wish to object to the introduction of this report on the grounds formerly urged before Your Honor, that the introduction of it violates the policy of the United States as laid down in the Interstate Commerce Act, Section 38, I think is the number, of Title 45.

THE COURT: There is no objection to the form of the report?

MR. DENNY: No objection to the form of the report.

THE COURT: The objection is overruled and the report is admitted in evidence.

(This report was filed and marked Plaintiff's Exhibit No. 3)

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WILEY MASON MYRICK, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. Will you tell the gentlemen of the jury what is your

occupation. A. I am an engineman on the Atlantic Coast Line Railroad.

Q. How long have you been an engineer for the Coast Line? A. Ever since 1924, up to the present time.

Q. Previous to that time in what capacity were you serving with the Coast Line? A. I was in the capacity of a fireman in engine service.

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Q. How long altogether have you been in the employ of the railroad company? A. About twenty-four years.

Q. Are you what is known as a road engineer or yard engineer? A. Both.

Q. You serve in whatever capacity you are called by the company? A. Yes, sir.

Q. On March 20, 1940, were you on duty as an engineer of the Atlantic Coast Line Railroad? A. Yes, sir.

Q. Were you on that day called for any special service for the company? A. I was called for the First 209 on that date.

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Q. Where did you then have to go to respond to that call by the company? A. Acca roundhouse.

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Q. Were you in Clopton yards that evening, the evening that Mr. Tiller was injured? A. Yes, sir.

Q. Were you in charge of the engine, the road engine, that came over from Acca on that occasion? A. Yes, sir.

Q. What was the number of it? A. 1635.

Q. What would be your run on that assignment—from what point to what point? A. From Acca to South Rocky Mount.

Q. You said something a moment ago that this was First 209. Will you tell the gentlemen of the jury what is First 209? A. First 209 is a through package train, you might say—through freight train—from Clopton to South Rocky Mount, what we call a through freight train, a train that

doesn't make very many set-offs, which is Collier and Weldon, North Carolina.

Q. Did I understand you to say "package train" a minute ago? A. Sometimes we call it a package train but it is known as high class freight train.

Q. Where did you get your engine that night? A. Acca roundhouse.

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Q. In making your trip from Acca to South Rocky Mount did you carry only the string of cars that you take out of the R. F. & P. yards? A. No, sir, we carried an additional amount of cars that came from Byrd Street Station.

Q. Was that a nightly occurrence when you were on that run? Was that a nightly occurrence to get part of the train from Byrd Street Station when you were on that run? A. Yes, sir.

Q. How many cars did you take from Acca that evening with your road engine on the way to Meadow and Clopton yards? A. It was a small amount of cars; I would say twelve or fifteen.

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Q. What happened after that? A. We called up at Meadow and got the instruction to cross over from Meadow by the way of Clopton.

Q. When you got to Clopton what did you do then? A. We stopped there for further instructions.

Q. I hand you this map and ask you to point out to the jury, if you will (this is an aerial map) the place where your train stopped when you came over from Acca. Can you orient yourself with this? A. Which is north and south?

Q. See if you can't find familiar items in the landscape? What is that? A. That is Clopton yard office.

Q. What is this road passing across the railroad tracks from east to west? A. That is Clopton Road.

Q. Can you identify these rails that cross Clopton Road running in this direction? A. Yes, sir.

Q. What are they? A. The two main lines and the slow siding.

Q. Point to the slow siding. A. This track here.

Q. The southbound rail? A. This one here.

Q. And where would the northbound rail be? A. Here.

Q. Is Clopton Road a public highway? A. Yes, sir.

Q. Can you point for the gentlemen of the jury where you stopped when you came to Clopton Yard the first time? A. We stopped over here at the yard office.

Q. Did you come around from Meadow, and on what tracks? A. We come around from Meadow on the old line from Meadow down to Clopton.

Q. Will you point out those tracks to me that you came in from Meadow to the yard office at Clopton? Can you point to the yard office at Clopton? A. This is the yard office.

Q. Where are the tracks you came on? A. Here is the track on the left side where we stopped at.

Q. That is the nearest track to the yard office? A. That is right.

Q. Did you stop at the yard office? A. Yes, sir.

Q. Tell the jury what happened then? A. We stopped at the yard office and got further instructions from our Yardmaster as to the next move to make.

Q. Was that order of the Yardmaster communicated to you as engineer and, if so, by whom? A. That was communicated to me by Mr. Dickens by way of signal.

Q. Were you following the signals that were given you by Mr. Dickens? A. After arriving at Clopton, I did.

Q. Mr. Dickens' capacity is what with the railroad? A. He is a trainman.

Q. Was he on your crew? A. Yes, sir.

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Q. After you had both gotten the orders and you stopped there on Clopton Hill, what did you do as a result of the orders that came to you? Tell the jury. A. Well, the next

move that we made at Clopton was to hold to the three gons.

Q. Will you explain to the jury what they are? A. I mean hold onto the three gons.

Q. What are "gons"? A. Gons are high side gondolas for the purpose of hauling coal and sand and gravel, and so forth.

Q. Is that car as high as a freight car? A. Yes, sir, I would say some of them are.

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Q. Were they the low side gondolas? A. No, they were high side gondolas.

Q. You held to three of them? A. Yes.

Q. Where were they to be set off on the road? A. Those three were supposed to be set off, the way I can remember now, was supposed to be set off at Collier.

Q. Where is Collier? A. Collier is our next local point south of Clopton.

Q. And your next point is what after you pass Collier? A. Next local point would be Weldon.

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Q. Collier is the Petersburg yard, is it not? A. Yes, that is right.

Q. That is what you mean when you say Collier? A. That is right.

Q. Then comes Weldon? A. Yes.

Q. Then what comes next? A. Rocky Mount.

Q. That is the end of your run, is it? A. Yes, sir.

Q. When you got your orders and took three cars away from the train that you brought over from the R. F. & P., you held to them, I believe you said? A. Yes.

Q. What did you do then? A. We headed down southward below the slow siding and then stopped.

Q. Did you cross Clopton road? A. Yes, sir.

Q. What did you do then? A. We headed south, southward below the slow siding switch.

Q. Did you go as far south as the crossover? A. We went beyond the crossover.

Q. Do I understand you to mean by that you went south of the crossover? A. Yes, sir.

Q. And what did you do when you went south of the crossover? A. We stopped and got a signal from the trainman after the switch had been changed to back in slow siding.

Q. Who gave you that signal? A. Mr. Dickens.

Q. And did you back in slow siding? A. Yes, sir.

Q. Is that the track that lies right next to the southbound rail? A. Yes, sir.

Q. And as you backed into slow siding what kind of an engine were you using? A. What kind of engine?

Q. Yes. A. Road engine.

Q. That engine that usually carries the train to Rocky Mount? A. An engine of that type, yes.

Q. As you backed up where were these three cars that you had taken away from your train? A. They was on the back of the engine that I backed into the slow siding with.

Q. As you backed in a northerly direction were the cars in front of the tender of your engine? A. Yes, sir.

Q. Was your engine running in reverse? A. Yes, sir.

Q. Who was in the cab with you? A. Mr. Wright, my fireman.

Q. Where was Mr. Dickens? A. Mr. Dickens was on the side of the leading car.

Q. Could you see him? A. Yes, sir.

Q. How was he holding on? A. He was holding on with both hands to the grab-iron.

Q. Did he have a lantern? A. Yes, sir.

Q. Was it in one of his hands? A. Yes, sir.

Q. And both were on the grab-iron? A. Yes, sir.

Q. How fast were you backing back? A. I would say about 4 or 6 miles an hour.

Q. Were you blowing your whistle? A. No, sir.

Q. When you were backing back at that rate of speed on

the slow siding, tell the jury where was the yard engine and what, if anything, was it doing? A. When we backed in slow siding the portion of 209 train had stopped on Clopton Road—

Q. What do you mean by the portion of 209 train? A. That was the portion that we coupled to. That was standing on Clopton Road. When we backed into slow siding the head portion of 209 moved off. That gives us a reverse movement.

Q. As you moved northwardly on slow siding, what was the train of cars drawn by the yard engine doing? A. He was moving southward ahead.

Q. Were you moving in reverse direction beside one another on parallel tracks? A. Yes, sir.

Q. How many cars was he pulling, do you know? A. I don't recall the number of cars he had. He had a cut of cars that he had cut loose from in order to make the classification that was necessary to be made.

Q. Was your bell ringing on your cab? A. When I was backing up, it was.

Q. When you got to Clopton Road and Mr. Dickens was hanging on by both hands, what happened then? A. When Mr. Dickens got on or near the crossing at Clopton Road, he got off.

Q. On which side of the leading end of the back-up movement? A. On the west side which was on my side of the back-up movement.

Q. When he got off what did he do? A. He come toward me.

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Q. Was the back-up movement still moving northward as he moved in your direction with his lantern? Were you still in motion when he came back toward you, going across Clopton Road. A. Yes, sir.

Q. How far did Mr. Dickens by his signals permit you to back up after he had left the rear end of that train? A. I would say a couple of car lengths.

Q. What happened next? A. Well, when Mr. Dickens rode up to the crossing and the cars had covered the crossing, he gave me a signal to stop which is to sign you down.

Q. Where was Mr. Dickens when he gave you the signal to stop? A. Mr. Dickens, I would say, was about the second car from the end.

Q. On the ground? A. On the ground.

Q. Did you stop? A. Yes.

Q. What happened then? A. When I stopped then Mr. Dickens went on westward in order to change the switch for me to come out slow siding when it was necessary for me to come.

Q. Was that in your direction or in the direction of Richmond? A. That was in the southward direction he was going to.

Q. Coming toward you? A. Yes, sir.

Q. When did you first know that Mr. Tiller had been hurt? A. I first knew about Mr. Tiller being hurt when Mr. Wright excited my curiosity by saying that he saw a flashlight on the ground that was lit.

Q. He was your fireman? A. Yes.

Q. In the cab with you? A. Yes, sir.

Q. What happened then? A. Mr. Wright said, "I saw a flashlight on this side burning," and I asked Mr. Wright, "Go get it," and he said, "I am afraid to go down there myself; you come go with me." So in the meantime Mr. Wright said he had been down and investigated the flashlight and didn't see anybody around there and he was uncertain whose flashlight it was or whether anyone had been hurt or something and he wanted somebody to go along with him.

Q. Did you know that Mr. Tiller was in the yard that night? A. No, sir.

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Q. What did you do then? A. We got down on the ground and started to walk toward the flashlight and I

asked Mr. Wright did he have a flashlight and he replied to me "Yes," and I asked him to let me use it, please, so we taken the light and flashed it along on the ground as we walked northward from the crossing and I saw an object that was dark on the ground on the east side of the slow siding about a car length from the engine. When I saw the hat I realized something had happened to Mr. Tiller for I recognized the cap that he wore.

Q. Did you see his flashlight—Mr. Tiller's? A. I had walked by the flashlight.

Q. Where was the flashlight? Tell the jury where was the flashlight lying when you got there? A. The flashlight to my best judgment was laying on the edge of the crossing. I might say four or six foot north of the crossing.

Q. Four or six feet north of the crossing? A. Yes, sir.

Q. Where was the cap lying? A. The cap was lying about, you might say, a car length north of the crossing.

Q. When you say "crossing", what crossing do you mean? A. Clopton Road.

Q. The public highway? A. Yes, sir.

Q. What else did you see? The flashlight—was it burning or not? A. It was burning. That is why it excited our curiosity to note it because we saw it laying on the ground and it was burning. Ordinarily it was dark enough so if it had not been burning we wouldn't have seen the light.

Q. What other object did you see as you went down? A. We walked on further from the cap and we saw Mr. Tiller's gun which was unbreached.

Q. How far was that from the cap? A. That was about a car length from the cap.

Q. What was the distance between the cap and the flashlight? A. I would say about another car length.

Q. What else did you see as you continued on? A. We walked on further and we saw, flashing the light under the car, a dark object under the leading car on the east side between the slow siding and the southbound main line and as we got near to it we saw it was Mr. Tiller.

Q. What did you do then? A. We went up then to his rescue. He was found between the brake hanger—you might say the brake shoe and the wheel. Myself and Mr. Wright—we assisted him from the place that he was fastened to, the very best we could, and laid him out between the southbound main line and slow siding.

Q. Was he conscious when first you got to him, so far as you know? A. He was not conscious when we first got to him but after we straightened him out it looked like he regained consciousness.

Q. Did he say anything; if so, what? A. He asked the question how did he get hurt and what hit him.

Q. Did he say anything else beyond that? A. Not to my knowledge.

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Q. After seeing what you have described to the jury, what did you do then? A. After we notified Mr. Jones and he came down to the scene and saw the condition of Mr. Tiller, he notified me to go back to the engine and discharge my duty and get into my train and get it ready to leave.

Q. Did you then go on to Rocky Mount? A. Yes, sir.

Q. When you first got to Mr. Tiller can you tell the jury what time it was? A. After we straightened Mr. Tiller out between the southbound main line and slow siding, I looked at my watch for my own evidence, and it was 7:15. I set it down on a clearance card that I have got with my instruction when I left Acca, Virginia.

Q. This was March 20, 1940? A. Yes.

Q. Was it dark? A. Yes, sir.

Q. Mr. Myrick, were any lights in that yard, Clopton Yard—overhead lights of any sort? A. No, sir.

Q. What sort of light did you have on the back of your engine or on the tender of your engine? A. We had a small bulb on the lining of the top of the tank which was a 15 or 30 watt light.

Q. What sort of light did you have on the leading end of the back-up movement? A. No other light other than Mr.

Dickens' light. You mean the back-up movement on the leading car?

Q. Yes. A. No other light than Mr. Dickens' light.

Q. This light that you have told the jury was a 30-watt light on the tender of your locomotive in the rear—you are familiar with the headlights on your locomotive, are you not? A. Yes, sir.

Q. And are you familiar with the rule of law which requires that a locomotive light be strong enough to show you an object as large as a man of average size standing erect at 800 feet ahead of your locomotive? A. Yes, sir.

Q. Will you tell the jury whether or not, with that small light on the back of your tender, you could see the erect form of a man 300 feet away? A. No, sir.

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Q. From 1918 until March 20, 1940, will you tell the jury whether or not you were called from time to time to be a member of the crew making up and carrying away the train No. 209? A. Yes, sir.

Q. How many times would you say in that period of years you had part in either making up or carrying away 209 to South Rocky Mount? A. You mean a year or month?

Q. Say a week; how many times a week or a month, either one? A. Well, I would say my record would show that I have been in there five or six times a month.

Q. Over that whole period of time? A. Yes, sir.

Q. Would that include from 1918 up to the time you became an engineman when you were a member of the crew in some other capacity? A. No, that would include from 1924 up to the present time that Mr. Tiller was hurt.

Q. Mr. Myrick, you backed up your road engine following orders given to your conductor and communicated to you by your brakeman on that night? A. Yes, sir.

Q. I want you to tell these gentlemen of the jury have you ever in your experience before made that movement that you made, backing up into slow siding that night? A. No, sir.

Q. What is the usual move that that road engine makes, as you know it from your experience on it, when it comes over from Acca, waiting for the train to be made up? A. The usual movement is we go down southward, south of slow siding, and stand there until our train were being pulled up to where we are supposed to hook on which was sometimes north and sometimes south of slow siding, and sometimes we wait on the brow of the hill where we are stopped at until the yard engine pulled off from it and we head on through the crossover and back up to the train and apply the brakes and release them which is necessary to do and proceed on our journey to South Rocky Mount.

Q. Then you, as I understand it, wait with the road engine either on top of the hill or go on down south of Clopton Road. On what tracks would you wait for the train to be made up by the yard engine? A. Sometimes it would be on No. 1 which is an extension of slow siding and sometimes it would be on No. 2 track.

Q. They are what you call pass-by tracks? A. That is right.

Q. Where are they located with relation to the south-bound rails? A. They are to the west side of the south-bound rails.

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Q. Immediately parallel to the southbound rails? A. Yes.

Q. You would wait on 1 or 2? A. Yes, sir.

Q. Until the train was made up? A. Yes, sir.

Q. But on this occasion do I understand you to tell the jury that you carried cars back in a back-up movement with the road engine? A. Yes, sir.

Q. Can you tell the gentlemen of the jury why that movement was made that night, that back-up movement with cars in front of your engine? A. I was told that move was made to back in slow siding for to get in the clear for the purpose of making a move that was an error leaving Byrd Street Station—the wrong classification.

- Q. Leaving where? A. Leaving Byrd Street Station.
- Q. An error made how? A. An error made in putting the car in the wrong place of the train.
- Q. And that occasioned it? A. Yes.
- Q. Who told you that? A. Mr. Dickens.
- Q. Your brakeman? A. Yes, sir.

CROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Myrick, taking this photograph again which has been introduced as Exhibit No. 2, you did not give the compass directions. Can you tell on that picture which is north? A. Yes, this is north.

Q. Is the bottom of the picture north? A. The right-hand to me now.

Q. These tracks coming in at the bottom of the picture and running diagonally across and disappearing out of the top of the picture are what tracks? They go to what point? A. This is the two main lines and this is the slow siding.

Q. Do those main lines run on into Byrd Street Station? A. Yes, sir.

Q. Is Byrd Street Station below this picture or above this picture? A. Byrd Street Station is north of the Clopton Yards.

Q. So that it is below the picture? A. Yes, sir.

Q. So that the bottom of the picture here is to the north, is it not? A. That is right.

Q. And the top of the picture is to the south? A. That is right.

Q. You will notice on one side of the picture as you look at the picture, the left-hand side, a large shed in the angle between the railroad tracks and the highway. Do you know what that is? A. Yes, the Southern Stockyards.

Q. That is on the east side of the railroad tracks, is it not? A. That is right.

Q. So that as you look at the picture the left-hand side is the east? A. That is right.

Q. And the right-hand side is the west? A. Yes.

Q. Beginning on Clopton Road and beginning with the east track crossing Clopton Road, you see there in the photograph those two rails which make one track? A. Yes, sir.

Q. What track is that eastern track? A. That eastern track is the northbound track.

Q. Look at it again--this eastern track right there? A. That is the spur leading to the Southern Stockyards.

Q. And that spur comes off the northbound main line just north of Clopton Road, does it not? A. That is right.

Q. Then I understand that immediately on Clopton Road to the east of the spur is the northbound main line? A. You are right.

Q. And the next track immediately to the east is the southbound main line?

MR. SATTERFIELD: You mean west.

MR. DENNY: West, I mean.

Q. And the next track immediately to the west is slow siding? A. That is right.

Q. Are those tracks which I have just mentioned all on a level? A. They are level with each other, yes.

Q. Moving further to the west, there is an appreciable space on Clopton Road where there is no track and you come to a track which leads back up to the west of the yard office? A. That is right.

Q. That, I understand, is the track down which you came? A. That is right.

Q. Does the ground rise between slow siding and this track that I have just spoken of on which you traveled or is there a little hill there? A. There is a little hill between Clopton Road and the point where I stopped at.

Q. On Clopton Road, in going west after you pass slow siding, does Clopton Road go up a little hill? A. Yes, sir.

Q. So that this track which runs by the yard office, immediately west of the yard office, is a little higher than slow siding? A. That is right.

Q. And then the last track on Clopton Road you see to the west is higher still? A. That is right.

Q. And then a little further to the west you come to the crest of that little rise, do you not? A. That is right.

Q. South of Clopton Road, which is here at the top of the picture, if you follow slow siding, it runs on down to a switch which connects slow siding with the track on which you came in? A. Yes, sir.

Q. And then that track continues on south. I believe you say that that continuation of slow siding to the south is sometimes called No. 1 track? A. That is right, sir.

Q. And the next track to the west is sometimes called No. 2 track? A. No. 2.

Q. And these other tracks to the west are tracks used in switching and storing and matters of that character? A. That is right.

Q. About how far south of Clopton Road does this yard with these eight or ten tracks extend? A. Well, I would say about 60 or 70 car lengths.

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Q. Now, Mr. Myrick, on the evening in question you came in from Meadow, as I understand? A. That is right.

Q. On this track immediately west of the yard office? A. Yes, sir.

Q. And you stopped close to the yard office north of Clopton Road? A. That is right.

Q. Was Mr. Jones, the Yardmaster, there when you got there? A. No, sir.

Q. After Mr. Jones arrived Mr. Dickens gave you a signal to move forward, did he? A. After he gave me instructions from Mr. Jones.

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Q. As I understand, you ran south across Clopton Road through this switch and pulled down on that No. 1 track far enough to clear the switch? A. That is right.

Q. Then did you stop? A. Yes.

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Q. While you paused there south of the switch on No. 1

track, did the yard engine come in from Byrd Street? A. Yes, sir.

Q. Did the yard engine, after it had taken some of its cars south of Clopton Road, stop? A. Yes, sir.

Q. When the yard engine stopped were cars both south of Clopton Road and across Clopton Road and north of Clopton Road? A. Yes, sir.

Q. Then what happened? A. Well, when Mr. Dickens gave me the signal to back into slow siding, after the switch had been changed, in order to get in the clear when this classification was made, the first portion of 209 pulled off.

Q. What do you mean by the first portion of 209? A. At that particular time to bring out, you might say, two classifications at one time which are known as First and Second 209. Second 209 classification would be on the head end of it.

Q. In other words, you mean the yard engine? A. That is right.

Q. It brings out from Byrd Street cars not only for your train but for the second section of 209? A. That is right.

Q. Those cars for the second section of 209 are for the local freight train which goes on some other time in the evening? A. That is right.

Q. Those cars are usually up next to the yard engine? A. That is right.

Q. And your cars are on the rear portion of the cut brought from Byrd Street? A. That is right.

Q. You said the front portion of 209. By that do you mean the front portion of the cars brought from Byrd Street by the yard engine moved on south? A. Yes, sir.

Q. Had a cut been made in the cars brought from Byrd Street? A. A cut was made, I imagine, about the same time I was given the signal to back up.

Q. In other words, at about the time you were given the signal to back up? A. The engineman on the switch engine received a signal to go ahead and at the same time I received a signal to back up. We both moved in opposite directions.

Q. So that while you were backing up the first part, the

south end of the cut from Byrd Street, moved on south and the north end of the cut from Byrd Street remained stationary over Clopton Road? A. Right.

Q. Do you know where that cut was made in the cars from Byrd Street? Was it made north or south of Clopton Road? A. It was made south of Clopton Road.

Q. About how far south of Clopton Road? A. I am not in position to say how far it was made south of Clopton Road. You see I was a distance up in the cut from him. I imagine his engine had pulled, you might say, ten or twelve car lengths by me, holding on the portion that he was holding on to and when he made a cut with this classification that was made in error, he signaled his engineman to go ahead and I had the same signal to back up at the same time and we moved in opposite directions of each other until I received the signal from Mr. Dickens to stop.

Q. And, as I understand it, when you were backing up, these cars were then in four sections? You had left one section up here on the hill? A. That is right.

Q. You had with you three hopper cars that you were backing into slow siding? A. That is right.

Q. The south end of the cars from Byrd Street was being pulled by the yard engine on down to the south end of the yard? A. That is right.

Q. The north end of the cars from Byrd Street, which were astride Clopton Road, were standing still? A. Yes, sir.

Q. Mr. Myrick, as you backed down slow siding how high up on that west side of the lead end of the first car in your back-up movement was Mr. Dickens? How high up off the ground? A. Mr. Dickens was on the step of the car holding on to the grab-iron on the leading end on the side I was on when he made the back-up movement.

Q. And that step is a foot or 18 inches above the ground? A. I would say two feet.

Q. Was Mr. Dickens, as you backed up, giving you any signal? A. He gave me a signal to back up.

Q. What is the signal to back up? A. A round circle.

Q. With his lantern? A. That is right.

Q. Was he giving you that signal during the back-up movement? A. He didn't give me that signal during the whole move.

Q. He gave it to you part of the time? A. That is right.

Q. And part of the time he was holding his lantern stationary? A. On the hand iron of the car.

Q. As I understand, when you are on First 209, the through freight, you carry cars to Petersburg or Collier, as it is sometimes called, to Weldon and to South Rocky Mount? A. That is right.

Q. In classifying those cars, in other words, in determining the arrangement in which they will be placed in the train, what is the arrangement in which they must be placed before you leave Clopton? What cars come immediately first behind your engine? A. What do you mean? In the classification to be set off?

Q. No, the classification to be made up for you at Clopton. What cars, when you leave Clopton, are immediately behind your engine going south to South Rocky Mount, from Clopton to South Rocky Mount? A. Well, I would say the Collier cars, which we will call Collier, known as Petersburg, would be on the head.

Q. That would be right behind your engine? A. Yes, sir.

Q. Then which cars? A. The cars next would be Weldon.

Q. Then the South Rocky Mount cars? A. Yes, sir.

Q. Does Weldon come first or Petersburg come first? A. Petersburg would come first, providing you didn't have any additional pick-up at Petersburg.

Q. Suppose you had Weldon cars on there and cars for Petersburg and Rocky Mount, which would be next to the engine? A. Well, if you had cars in both of those classifications, the Petersburg cars would be on the rear and the Weldon cars would be next to the engine.

Q. The Weldon car next to the engine and then Petersburg cars and then South Rocky Mount cars? A. Yes, sir.

Q. Is it a normal occurrence, almost a nightly occurrence,

for the road engine to come from Acca with cars certainly for two of those three points, Petersburg, Weldon and Rocky Mount, and cars come from Byrd Street for two or all three of those points? Do you understand my question? A. Yes.

Q. Is that almost a nightly occurrence. A. That is a nightly occurrence.

Q. Is Clopton Yard then used for the purpose of taking the cut that you bring and taking the fast freight cars brought from Acca in order to amalgamate those two cuts so as to get them prepared for you to take on south? A. Absolutely right.

Q. I suppose some evenings that can be done in a small number of movements and other evenings it takes a large number of movements to get that train prepared? A. Yes.

Q. Who prepares that train? Does the road engine prepare it or does the yard engine prepare it? A. The yard engine.

Q. On the night in question had you kept your engine up on the hill by the yard office, could the yard engine have prepared your train for you that night? A. That particular night?

Q. Yes. A. No, sir.

Q. Is it a usual and normal and frequent occurrence, depending on the cars which come in and the arrangement of those cars, that the road engine, either by itself or with some cars, has to come down off the hill and get out of the way so that the yard engine can make up the train? A. Yes, sir.

Q. When the road engine comes down off the hill and gets out of the way to permit the yard engine to make up the train, is it making a move which you gentlemen recognize as a move in road service or is it making a move which you gentlemen recognize to be a movement in yard service? A. That is in yard service.

Q. Is a road engine making a move in road service or is it making a move in yard service? A. Let me get it clear before I answer that.

Q. My question was not well worded. A. When I got in slow siding by the signal from Mr. Dickens, that was a road move.

Q. That was a move in road service? A. Yes, that was a move in road service for the purpose of a yard engine making the necessary classification that should be made with that train.

Q. When the yard engine was making the classification moves, after you had gotten out of the way, was the yard engine making moves in road service or in yard service? A. The yard engine was making moves in yard service.

Q. I understand that after you had received the signal from Mr. Dickens to stop your back-up movement and you had come to a stop, the car immediately north of your engine and part of your tender were on Clopton Road? A. Yes, sir.

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* Q. Was there anything unusual about the condition of that pistol? A. The pistol was unbreached. What I mean by that, the chamber was out.

Q. The chamber was open? A. Yes, sir.

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Q. As I understand, the truck, as you call it, the wheels under a freight car, consists of four wheels, two on a side? A. Yes, sir.

Q. Was Mr. Tiller caught up under the north wheels, that is the lead wheels of the truck, or under the south wheels, that is the second wheels of the truck? A. Mr. Tiller was caught under the second wheels of the truck.

Q. How far from the end of the car is this wheel in which Mr. Tiller was caught? A. I don't know the exact number of inches and feet, sir. I would make a rough estimate. I would say about 5 or 6 feet.

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Q. Have you worked both in yards that have overhead lights and in yards that do not have overhead lights? A. Yes.

Q. From your experience in working in lighted yards and in unlighted yards, which do you find makes the operation of the movement of trains in the yard easier and better for men working in the yard? A. I prefer the lighted yard.

Q. Clopton Yard had no overhead lights in it? A. No, sir.

Q. During the three years, we will say, or approximately three years prior to the death of Mr. Tiller, how many times a month would you say that you were there in Clopton Yards when 209 was made up, during the three years prior to the death of Mr. Tiller? A. Well, I would say from four to six times a month.

Q. And had you been through the years in there about the same number of times? A. I would say yes, sir.

Q. Or had there been a considerable period in there when you had been very little on this run? A. Well, it is times that being in the freight run that I went for, you might say, eight or ten days and not come in contact with Clopton at all—what I mean, come by the way of Clopton at all, and then, on the other hand, I have been in there every other night for, you might say, six or ten nights out of a month.

Q. Before moves are made in a freight yard is notification given to men working around through the yard or only to those that have to make the moves? A. Everyone would have to watch for hisself in yard service.

Q. By that do you mean that men who are working in yards know that they are not going to be warned of the particular movements that would take place but that almost any movement may take place in a yard? Is that what you mean?

MR. GARY: We object to that on the ground that it is a question of law.

THE COURT: Objection overruled.

BY MR. DENNY:

Q. I mean this, Mr. Myrick: Before a move is ordered in a yard, or before a move is made in a yard, are the men

working around in the yard warned of what that move will be or does the man in charge of the yard simply tell the people who make the move of the move he wants made? A. The man in charge of the yard tells the men that is in charge of the particular move that he wants to be made.

Q. Do you give any warning to other people around in the yard or any notification—tell them what move you are going to make? A. There is no other warning to give other than to tell them personally.

Q. That is the people who are going to make the move? A. Yes.

Q. In other words, if the yard engine is going to make a move out there, are you, as road engineer, informed what that move is going to be? A. No, sir.

Q. And if a man is working on the ground in the yard but doesn't have to throw any switches or doesn't have to do anything relating to the particular move, is he told what the move will be? A. No, sir.

Q. Do you, in making up freight trains in Clopton Yard and in other yards, follow the same routine night after night or do you sometimes use one set of tracks and another time use another set of tracks? A. Well, at the time of this particular occasion on 209 we get our train from the south end of Clopton Yard.

Q. And sometimes you get it other places? A. Sometimes we get it up at the crossover at slow siding which is Clopton Road.

Q. Let me come back to my question and see whether you feel my question can be answered. If you don't feel that it can be answered, just say so. In making up freight trains in a freight yard, Clopton or any place else, do you regularly follow the same set of moves day after day or night after night or do you on one occasion make one set of moves and on another occasion another set of moves? A. We make the move that it is necessary to suit the condition of what we come there with.

Q. And that means different moves on different occasions, doesn't it? A. Yes.

Mr. DENNY: If the Court pleases, there is a stipulation or agreement of counsel that it is not necessary to prove by the stenographer the former testimony. I have the former testimony, using it under that stipulation.

Q. Mr. Myrick, did you testify when this case was tried in September of 1941? A. Yes, sir.

Q. On that occasion your testimony was as follows, part of it, on cross examination:

"Q. For how long prior to Mr. Tiller's death had you been on that train an average of five or six times a month?"

They were referring to First 209.

"A. That has been practically ever since Mr. Tiller's death.

"Q. I say before Mr. Tiller's death. A. Oh, before Mr. Tiller's death I would say it was months that I wasn't in Clopton Yard at all.

"Q. So that before Mr. Tiller's death on just occasional times were you on that run? A. Well, I reckon we are not assigned to any regular run and in freight work we work first in and first out. I would say I would average in two or three trips per month.

"Q. And that had gone on for about how long? A. That had gone on for about, I reckon, from about 1938.

"Q. So that beginning about 1938 you had averaged two trips a month up to Mr. Tiller's death? For about two years prior to his death you had been in there a couple of times a month? A. Yes."

On the former occasion you testified that during the two years prior to Mr. Tiller's death you had been in there an average of two or three times a month and sometimes a month at a time without being in there. Your recollection today, on both direct and cross examination, is that during that period you had run in there four to six times a month. Can you state to the jury which you think is your more accurate estimate? The estimate you gave back in 1941 when

you testified before or the estimate you give today. A. Well, I have no way of telling the exact number of times that I had been on this particular run but I would say, owing to the time tickets that I made in this particular estimate, it would be anywhere from three to four times per month.

Q. Do you think your memory then, two years ago, was more accurate concerning this matter than it is today? A. Well, I don't see why it should be, sir.

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. You said something in response to Mr. Denny's question a moment ago, when he was seeking to compare your testimony on a former occasion with what you are saying today, about some time tickets. A. Yes, sir.

Q. What do you mean by that? A. That is a record of the time that I make on these particular jobs, which is First 209 or Second 209 or Third 209, or whatever they might be.

Q. Do I understand you have referred to your time tickets since the last trial? A. Yes.

Q. Have you got those time tickets? A. I have a portion of them.

Q. What do they indicate as to the number of times that you have been on that 209 run since 1924 up until the time of the death of Mr. Tiller? A. Well, my testimony today, I think, is correct.

Q. About how many times per month? A. I might say from three to four times per month and sometimes I have been in Clopton Yard as much as eight or ten times per month and then a month goes that I don't go in there at all.

Q. You said something this morning about five or six times a month? A. Well, I would reckon that would be a rough estimation about the time but I reckon it would average if I could correct myself by looking at my time tickets, if I had them all at present that I could show—

Q. Have you got them at your home? A. I have a portion of them at home.

Q. What years do they cover, do you know? A. They come in from the time when I was promoted right up to the present time.

Q. From 1924 right up to the present time? A. Yes.

Q. Mr. Denny asked you something a moment ago about the truck on this coal gondola. There are two trucks on the front end of the car, I believe you said, and there are two on the back end of the car? A. Yes, sir.

Q. The lead truck has four wheels, two on each rail; is that not true? A. That is right.

Q. Which one of the trucks did you have in mind that Mr. Tiller had been found under, the first or the second truck at the leading end of the back-up movement? A. I would say the second truck. I would say the first truck would mean the truck with the first wheel on the leading car.

Q. You mean the first wheel of the first truck on the leading car? A. Yes, sir.

Q. Was he in front of that wheel or between that wheel and the second wheel? A. He was behind the second wheel, between the brake hanger and the brake shoe.

Q. Between the second wheel of the first truck or the second wheel of the second truck? A. The second wheel of the first truck.

Q. He was between the first and second trucks? A. No, sir, he was behind the two trucks. The whole two trucks, it looked like, the way he was found, had run over him.

Q. You don't know about that but that is the position that you found him in? A. That is the position that I found him in. He was caught between the brake hanger and the brake on the second wheel and his body was forced up about halfway of the wheel.

Q. Mr. Myrick, I want to ask you this question: Mr. Denny has asked you about the many different movements that are made in a yard and Clopton Yard was mentioned particularly, in assembling and classifying trains. I want

you to tell the jury whether or not those many moves are made by the road engines that you were on at the time that you were assigned to 209 or made by the yard engine? A. Those moves was made by the yard engine.

Q. Did you ever make any such move as you made on this night in all your experience before? A. Not in Clopton Yard.

Q. Do you recall that any time in your whole experience in Clopton Yard, at the time 209 was being made up, there were any other engines in that yard save your road engine and the yard engine?

A. No, sir, I do not.

Q. Just those two engines? A. Yes. If there was any more, it would be beyond my knowledge.

A. I am not in position to say what that yard engine was doing but I do say that we made the back-up movement when the yard engine was going ahead.

Q. In which direction? A. In southward direction.

Q. Then you were moving in opposite directions at the time? A. Absolutely, sir.

RECROSS EXAMINATION

BY MR. DENNY:

Q. Did you see Mr. Tiller at all that evening until you found him there caught up under the wheel and brake shoe? A. No, sir, I did not.

Q. As I understand, you have on each freight car two trucks, don't you? A. Yes, sir.

Q. One at the front and one at the rear? A. Yes, sir.

Q. Each truck consists of two sets of wheels? A. Yes, sir.

Q. So that as you look at a freight car from the side, you see four wheels? A. Yes.

Q. Was Mr. Tiller caught under the north wheel of this

car or was he caught under the next wheel to the north wheel? A. Mr. Tiller was caught under the next wheel to the north wheel. Mr. Tiller, in facing the movement going ahead, was caught under the second car and he was pinned under the brake hanger of the second truck. What I mean by the second truck, the second wheel.

Q. Of the front truck? A. Of the front truck.

Q. Was there any indication that the first wheel of that truck had run over him? A. I didn't see it.

Q. Would you be able, having found him there, to state any facts which would indicate whether the front wheel had run over him or whether it had not run over him? A. No, sir, I didn't look for any indication of what he had been hit by or otherwise. I was so badly worked up on the condition I found him in that I gave him all of my attention, and to assist him out of the condition he was in.

Q. Was his leg, or his arm, mashed flat? A. His leg was.

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MR. SATTERFIELD: We have agreed, provided it meets with your approval, to permit the defendant to put on some witnesses at this time and we will be delighted to accommodate them.

J. A. WALL, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. TOWNSEND:

Q. Your name is Mr. J. A. Wall? A. Yes, sir.

Q. Where do you live, Mr. Wall? A. Savannah, Georgia.

Q. What was your position with the Atlantic Coast Line in March of 1940? A. Superintendent of Transportation.

Q. Are you now Superintendent of Transportation? A. No, sir, I retired on the 15th of July.

Q. In the course of your duties as Superintendent of Transportation of the Coast Line, was it your duty to make up reports to the I. C. C. and the various state corporation

commissions of accidents that occurred on the road? A. Yes, sir.

Q. And how were those reports made up, Mr. Wall? From what data? A. They were made up by a clerk in my office, assigned to that job and he made them up from reports received from the superintendent and from the train crew.

Q. Did you personally have anything to do with that, Mr. Wall? A. Not in the preparation of the report.

Q. Who was your clerk who made up those reports in March, 1940? A. Mr. J. M. Parrish.

Q. You made a report which has been introduced in evidence here of an accident to Mr. J. L. Tiller on March 20, 1940. Did you know anything personally about the facts of that accident? A. No, sir.

Q. You signed such a report in the course of your duties, did you not? A. Yes, sir.

Q. And who made up the report? A. Mr. J. M. Parrish.

CROSS EXAMINATION

BY MR. SATTERFIELD:

Q. Mr. Wall, did you make this statement under oath? A. Yes, sir.

Q. Have you any reason to question its veracity now? A. No, sir.

MR. GARY: May it please the Court, at this time by stipulation of counsel we would like to read into the testimony the statement of Mr. F. A. Wilkinson, a witness who testified at the former trial, referred to this morning. Mr. Wilkinson testified as follows—examined by Mr. Moore.

MR. DENNY: Mr. Moore was counsel for the plaintiff?

MR. GARY: Yes, and Mr. Wilkinson is in the hospital, so that it was impossible for him to be here today and counsel have agreed to stipulate his testimony.

NOTE: The testimony was read as follows:

F. A. WILKINSON, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. MOORE:

Q. You are a section foreman for the Atlantic Coast Line Railroad Company, are you not? A. Yes, sir.

Q. How long have you been employed by them? A. 28 years.

Q. Do you have charge of the Clopton Yard territory?
A. Yes, sir.

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Q. Mr. Wilkinson, the distance between the rails of the southbound main line and the inner rail of the slow siding is the same all the way from Clopton Road down to this switch, is it not? A. Yes, sir.

Q. What is the distance between this rail and of the southbound main line, that is the far western rail, and the eastern or inner rail of the slow siding? A. That is 7 foot 11 inches and one-half.

Q. What is the total overhang of a freight car? How much does it extend out over the rail? A. Well, in some instances a regular car would be 24 inches from the outside of the rail but there is a variation sometimes in a larger sized car.

Q. In the usual sized car there would be an extension of two feet? A. That is right, from the rail.

Q. So that if two trains, both of which had usual cars on them, were passing each other on the slow siding and the southbound main line, what would be the distance between these two trains? A. That would be four foot three inches and one-half.

Q. Does a hopper car, which you call a coal hopper, project out any more from the rail than does the ordinary freight car? A. Yes, sir, the drop-over car does.

Q. How much more? A. Four inches.

Q. And what would be the distance between a train on the slow siding and one on the southbound main line if one of those trains had hopper cars in it? A. If both had hopper cars?

Q. If one side had hopper ears. A. If one side had a hopper car, you would have three foot seven and one-half inches clearance.

Q. What would it be if both had hopper cars? A. You would have three foot three and one-half inches.

Q. That three feet three and one-half inches would be the distance between the two trains moving on parallel tracks? A. Yes, sir.

Q. Is there any street light at Clopton Road? A. No, sir.

Q. Will you state again the distance between two normal freight cars, that is the ones that extend over the usual distance, moving on those parallel tracks? A. That is the average freight car?

Q. Yes. A. That would be four foot three and one-half inches.

Q. The overhang on each side would be twenty-four inches, would it not? A. Yes, sir.

CROSS EXAMINATION

BY MR. TOWNSEND:

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Q. Your overhang then is calculated from the center of the rail and not the edge of the rail? A. That is right.

Q. So you would have a clearance of four feet three and one-half inches, wouldn't you? A. That is right.

Q. Is that plenty of room for a man to walk between while the trains are going? A. Well, I will tell you they don't get much larger than I am and I walk through very handy.

Q. While the trains are going in opposite directions? A. Yes, sir, if they wasn't running too fast.

Q. Then if they are running too fast— A. If they are running too fast I lay down.

REDIRECT EXAMINATION

BY MR. MOORE:

Q. Mr. Wilkinson, would you stand in between those two trains, facing one of them, and hold out your arm and not

watch the other one? A. Not if I knew the other one was coming.

RECROSS EXAMINATION

BY MR. TOWNSEND:

Q. Is that the ordinary and usual clearance between tracks? A. That is our standard—13 foot centers, from center of track to center of track.

MR. SATTERFIELD: Our next witness is a gentleman we desire to call as an adverse witness. I don't know whether the rules of the court require me to state the reason for that and I am not sure that I am in order in stating it in the presence of the jury.

THE COURT: Do you want to examine him as on cross examination?

MR. SATTERFIELD: Yes.

THE COURT: Have you gentlemen anything to say?

MR. DENNY: We don't know who he is referring to.

MR. SATTERFIELD: Dickens.

MR. DENNY: I recall Mr. Dickens formerly was one of Mr. Satterfield's witnesses in the trial of this case and Mr. Satterfield, prior to Mr. Dickens' former testimony, summoned this witness to give a deposition, so that prior to the former trial Mr. Dickens had given a deposition and Mr. Satterfield put him on the stand as his witness in the former trial and I see no reason why he should be accorded the liberty of cross examination.

MR. SATTERFIELD: In answer to that I should like to state to the Court that since the former trial I went to the home of Mr. Dickens to ask him if he would not confer with me and he showed me the rule of the company in which he was told in that rule that he should not talk to any attorneys except attorneys for the railroad company. We then called Mr. Denny on the telephone in Mr. Dickens' apartment and Mr. Denny came to the phone and called Dickens to the

phone and told him to talk to us but he steadfastly refused to talk to us on the matter and I think we are within the rules in asking that he be called as an adverse witness.

THE COURT: Is he an employee of the company?

MR. SATTERFIELD: He is an employee of the company and one of the crew on the night of this accident.

MR. DENNY: In reply to that statement, I was called by Mr. Satterfield and Mr. Dickens came to the phone. I told Mr. Dickens that the rule of the company was that it was permissible for him to talk to any party in interest or their attorney if he desired to talk with them, that the company had nothing to do with the question of whether he talked with them or didn't talk with them and, so far as the company was concerned, he was at perfect liberty to talk or not to talk as he saw fit and that there was no rule prohibiting him from talking to a party in interest or his attorney.

MR. SATTERFIELD: Let me say, in reply to that, that I called Mr. Dickens' attention to the fact that the rule which he referred me to, printed in the rule book, which says they are not permitted—employees of the Atlantic Coast Line Railroad Company—to talk to anybody save the attorney for the Coast Line Company, had been changed by congressional enactment, and, despite that assurance on my part, despite the conversation with Mr. Denny, he refused to talk with us and I think we should be permitted to call him as an adverse witness and not be restricted to direct examination of this witness.

MR. DENNY: And in reply to that statement I think I should say that I called to the attention of both Mr. Dickens and Mr. Satterfield that after the Act of Congress was amended in 1939, the rule of the Atlantic Coast Line was amended in exact accordance with the Act of Congress and, not only under the Act of Congress but under the rule of the railroad there is no prohibition against an employee of the railroad talking to a party in interest and, of course, a party in interest includes counsel for a party in interest. In the particular case of Mr. Dickens, I say again that Mr. Sat-

terfield had Mr. Dickens on deposition in the spring of 1940 and put him on this stand in September of 1941 as his witness, so that he has before him two records of Mr. Dickens' sworn testimony.

THE COURT: Mr. Satterfield, you can put Mr. Dickens on the stand and if it should appear that it is necessary to examine him as a hostile or adverse witness, I will allow you to do so.

R. L. DICKENS, called as a witness by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. What is your age and your occupation? A. Twenty-seven; I am a trainman, braking and flagging and extra conductor on Atlantic Coast Line Railroad.

Q. How long have you been in the employ of the Atlantic Coast Line Railroad? A. This December it will be seven years.

Q. Have you your rule book with you, Mr. Dickens? A. Yes, sir.

Q. May I see it, please. Are there any other amendments or addenda in the rules that you now have in your possession? A. What is that now?

Q. Are there any amendments to these rules that you now have in your pocket that go with these rules? A. No, sir, that rule book stands as it should be.

Q. Just as it is? A. Yes.

Q. You have had no notice of any change in the rules of this book, have you? A. I pasted a slip over Rule 711, a new ruling on Rule 711.

Q. First of all, may I ask you if this book was issued to you by the Atlantic Coast Line? A. Yes.

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Q. You were examined on the contents of this book? A. Yes.

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Q. It contains general rules and special rules? A. That is right. Our examination at that time did not include the rules—I believe it is special rules. It did not include the special rules.

Q. But since then have you been examined periodically on all of the rules? A. Not periodically. I have taken the conductor's examination and we have rule meetings.

Q. Don't you have rule meetings every year? A. Yes, sir.

Q. How often? A. I believe those rule meetings are every six months. Is that right?

Q. You just answer, please. A. As far as my knowledge, every six months.

Q. You have ample knowledge on this; you have not been long in the employ of the company. A. Yes, sir, I think so.

Q. How often have you been examined on the rules? A. Twice.

Q. Each year? A. Once when I was hired as a brakeman and once when I was promoted to conductor.

Q. Isn't it a fact that you are examined every fall, that you have a group who get together and go over the rules down here on the company's premises? A. Yes.

Q. You have been over them more than just twice, have you not? A. Not me personally—just a group getting together and talking about the rules.

Q. Who conducts that meeting? A. At times I have been at a rule meeting with Mr. Pollard conducting the meeting and Mr. Murchison.

Q. The gentlemen you have named—what is their connection with the railroad company? A. Trainmaster and Superintendent.

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MR. SATTERFIELD: At this point, if Your Honor please, we want to offer this book of rules in evidence.

MR. DENNY: May it please the Court, we have no objection to Mr. Satterfield taking any rule he desires to take out of that and offering it in evidence but each one of these books

is specially accounted for by the Coast Line and issued to one man. It happens to be they are all numbered. We do not wish to leave the rule book here in evidence or have the rule book as whole introduced.

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MR. SATTERFIELD: I am not approaching that question at the moment. I have attempted to lay the foundation for the introduction of some of the rules of this book and I assure the Court at the proper time we will point out the rules that are pertinent when the evidence is in as to those we want to be made a part of the record and we have been unable to get hold of this rule book until just now by a subpoena duces tecum and we would like to read the rules in the book and point out, before the evidence is in, those rules that we ask to be made a part of the evidence.

THE COURT: It can be marked for identification and then, after examination, you can offer the rules you desire.

MR. DENNY: I would like to say to the Court that we object to the introduction of no specific rule but we do object to the introduction of the rule book as a whole.

THE COURT: It has not been introduced.

MR. SATTERFIELD: I ask that it be identified and later we will point out the rules that, in our judgment, are pertinent and ask the Court to have them made a part of the record.

(The rule book was marked Plaintiff's Exhibit No. 4 for identification only)

BY MR. SATTERFIELD:

Q. You are a brakeman and you were assigned to 209 on March 20, 1940, were you not? A. Yes, sir.

Q. Where did you join your train crew? A. At Acca Yard.

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Q. When you got to Clopton Yard what did you do? A. When I got to Clopton Yard there was no one there. Shortly after Mr. Jones, our Yardmaster, drove up and I walked toward him for instructions.

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Q. Instructions for what? A. It is our usual move to go Clopton and find out the moves they want to make and follow the Yardmaster's instructions.

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Q. What did the yardmaster tell you to do? A. He asked what we had in our train and I told him three Petersburg cars and the rest through.

Q. Then what did you do? A. He told me to cut my three Petersburg cars off and back into slow siding.

Q. Where were you when you received these orders? A. Around in the vicinity of Clopton Road.

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Q. I want you to explain to me how you got off the hill. The Yardmaster told me what to do and I went to the car of three cars, pulled the pin, cut the air, gave him a signal to go ahead and he proceeded to do as my signal told him.

Q. It was Mr. Myrick you are talking about? A. Yes.

Q. Where did you go? A. Went off the hill down to the ditch that leads to No. 1 or slow siding. In reverse movement I threw the switch back and he backed into slow siding on my signal.

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Q. Did he carry them south of the crossover down on the road before you threw the switch for them to come back?

Yes, sir, he would have to.

Q. He had room enough to get in there with three cars and the engine, didn't he? A. Yes, sir.

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Q. You were but following the orders of the Yardmaster? A. That is true.

Q. Did he order you to back the road engine up that night with these coal cars in a backward movement into slow siding? A. Yes, sir.

Q. When did you first gave a signal to Mr. Myrick to come

on back into the slow siding? A. After I had thrown the switch.

Q. While you were standing on the ground? A. Yes, sir.

Q. Then what did you do as he started the back-up movement? A. Caught the rear of the lead hopper car on the engineer's side and rode back to the road crossing, got off at the road crossing and signed him back until I figured he was in the clear and gave him a stop signal.

Q. When the leading end of the back-up movement came to Clopton Road, the south side of Clopton Road where you begin to cross it, you got off? A. Yes, sir.

Q. Did the three cars and the road engine continue to move slowly on across Clopton Road? A. Yes, sir.

Q. You had left it then, had you not? A. That is right.

Q. Was there any light on the leading end of that back-up movement as it went across the road? A. No, sir.

Q. Was there any light on it as it passed on down and beyond the road and off of it? A. There was a light on the rear until I got to the center of the road.

Q. I am not asking you that. When it had passed Clopton Road and was going on down northward of Clopton Road, did it have any light on the leading end of the back-up movement? A. When it passed Clopton Road it had no light on the lead of the back-up movement.

Q. From that time until you stopped? A. That is right.

Q. Did you estimate, standing where you were, that it had gone far enough down into slow siding? A. Yes, sir, I could see it was in the clear.

Q. Which end of the train were you watching to see whether it was in the clear—the leading end of the back-up movement or the engineer? A. The engineer.

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Q. When you got off of the coal car did you not then turn and face in the direction of the engine, Mr. Myrick's engine, the road engine? A. I probably did.

Q. Were you watching the road engine to see whether it was in the clear? A. Yes, sir.

Q. Did you or did you not turn and look toward the engine when you got off? A. I don't know. I suppose I watched the engine to see if it was in the clear after I had protected Clopton Road.

Q. After the leading end of the back-up movement was crossing the road and was heading in a northerly direction, isn't it a fact you turned to see when the engine would clear the switch? A. That is my natural move.

Q. Didn't you make that move that night? A. Yes, sir.

Q. Didn't you walk in that direction because you wanted—
A. I walked in the direction of the switch, yes, sir.

Q. With your lantern? A. Yes, sir.

Q. Which hand were you carrying your lantern in when you got off of the coal car? A. My left hand, I believe.

Q. You were hanging, as you got ready to leave, with your right hand in this position, holding on to the handlebar or whatever you call it? A. The hopper car.

Q. And you stepped off with your left foot first and your lantern in your left hand, did you not? A. Yes, sir.

Q. You wouldn't step off with your right foot first? A. No, sir.

Q. When you stepped off is it or not a fact that the gondola car was moving onward across Clopton Road? A. Yes, sir.

Q. In the years that you have been with the Coast Line since 1937, how many times have you been called for assignment of duty in connection with 209? A. Up to the present date I would say approximately forty times. That is just an approximate guess on my part. I really don't have the actual figures.

Q. In the forty times that you were assigned to duty with 209 was it with the road engine or yard engine? A. With the road engine.

Q. Was there ever an occasion when you were connected with the making up of train 209 and the road engine that you made a similar move to back up into slow siding? A. Was there ever an occasion?

Q. Did you ever make that move that you made that night with that road engine before? A. I have made that move, yes, sir.

Q. How many times? A. I don't know. It depends on how the cars are situated in the yard.

Q. How many times have you backed, by your signal on order of the Yardmaster, that road engine with cars being pushed previous to that time? A. Never.

Q. The only time you have ever done it is since? A. Yes, sir.

Q. Up to then did you mean to say you had forty experiences with that run? A. No, sir, not previous to that time.

Q. Previous to that time how many times had you been in there? A. I would make a rough estimate of twelve to twenty times and might have been fifteen or eighteen or twenty.

Q. On the twelve or eighteen or twenty occasions, tell the jury what you did with that road engine? A. Sometimes we were coming to Clopton Yard having Petersburg cars and through cars. The train coming to Clopton Yards would have Petersburg cars and through cars. I would cut my Petersburg cars off, couple to the train from Byrd Street, pull it up and back up to the rear portion of my train and go away. Sometimes arriving at Clopton we had Weldon and Petersburg cars. My natural move would be to get in the clear with my Weldon cars, let the yard engine come to the train I had brought to Clopton, get the Petersburg cars off of that train and put them to the train that came from Richmond yards, thereby classifying the train together. After they had made their move the yard engine would go away and I would get out of the clear, that is, I would come back to the train that the yard engine had left there, couple up and go away.

Q. Then you would either wait sometimes on top of the hill or you would go down to the crossover or south of the crossover and wait in the yard for the yard engine to make the train up? A. We always waited on top of the hill until

the conductor had come down and called the yardmaster by telephone.

Q. Even before that you waited sometimes below in the yard for the train to be made up? A. Occasionally.

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A. We usually waited on the hill until the yard engine showed up.

Q. I mean after it came over didn't you go down over the crossover to get out of the way and stay out of the way?

A. We usually waited in No. 1.

Q. You usually waited in No. 1? A. Yes, and sometimes maybe No. 1 was filled up.

Q. Then there was No. 2 to the right? A. You couldn't get into No. 2 by head-on movement. You would have to go up in No. 1 and back back. We were on the hill sometimes until the yard engine was through making his moves.

Q. Save for the light that you carried in your hand, was there any other light anywhere or about that leading car on that back-up movement? A. On the leading car, no, sir.

Q. What sort of light did you have on the engine tender, Mr. Myrick's engine? A. Had an electric bulb about the center of the end of the tender on top.

Q. How big a light was that? A. I imagine it is a 40-watt bulb maybe, a small electric bulb.

Q. Did it throw any light down on the track? A. No, sir.

Q. Was there any light in the yard at all? A. Nothing but switch lights.

Q. Green and red? A. Green and yellow.

Q. They are on the ground, aren't they? A. Yes, sir.

CROSS EXAMINATION

By MR. TOWNSEND:

Q. Mr. Dickens, did you ever operate in a lighted yard?

A. We leave Acca, Virginia, in a lighted yard.

Q. What is your preference as to efficiency and safety of a lighted yard and an unlighted yard? A. Personally I

would prefer to work in an unlighted yard. A lighted yard caused me to fall in a ditch at Acca Yard once.

Q. What is your reason for saying that you prefer working in an unlighted yard? A. My reason is everything is dark and if I have a lantern in my hand you can see what you want to see with that lantern. If there is a floodlighted yard it is not focused exactly like I want it and shining in my eyes, on the cars and everywhere and it blinds me at times. It blinded me so much that night that I stepped into a ditch at Acca Yard.

Q. You feel safer in an unlighted yard? A. I would prefer an unlighted yard. I feel safer in an unlighted yard.

Q. Why, Mr. Dickens, did you go to Clopton Road on the lead end of the three hopper cars that night? Why did you go to the road? A. To protect the road crossing from the westbound traffic. The road was already protected by a cut of cars. I don't mean westbound. I mean eastbound from the west. The road was already protected for westbound traffic from the east by a cut of cars.

Q. And, as I understand it, the train from Richmond, having some seventy cars, had at its lead end the cars for Second 209 and they cut off the Second 209 cars and a car for Rocky Mount classification and went on south in the yard; is that right? A. They cut off Second 209 train and a car for what?

Q. A car for Jacksonville which was in the Petersburg classification as it came out of Byrd Street? A. That is right. They cut that off and proceeded south.

Q. And moved on south? A. Yes.

Q. Then that left the cars for First 209 standing still astride of Clopton Road, did it not? A. Yes, sir.

Q. So that Clopton Road was protected from westbound traffic or traffic from the east by the cars of First 209 which were standing on Clopton Road? A. Yes, sir.

Q. And what you rode those three hopper cars back for was to protect it from eastbound traffic? A. Yes, sir.

Q. On Clopton Road? A. Yes, sir.

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Q. Were you or not giving signals to the engineer to continue his backward movement from time to time after you threw the switch and started to go back over Clopton Road? A. I suppose so, yes, sir. It is natural for me to give him a back-up signal.

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Q. Did you continue that until you got off of the car from time to time? A. I don't remember, Mr. Townsend. I might have or I might not have. It wouldn't be necessary but to give one signal to back up. Sometimes I do and sometimes I don't.

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Q. About where did you get off on Clopton Road? A. I would say in the middle of Clopton Road.

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Q. What was your speed? A. Anywhere 4, 5 or 6 miles an hour.

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Q. Would it or not be natural for you to take a step or two with the motion of the train to the north as you got down off the train? A. I would have to.

Q. You would get thrown if you didn't? A. I just couldn't stop all at once.

Q. You would feel a forward movement and you would continue on that forward movement? A. Yes, sir.

Q. About how far do you think that forward movement would take you? A. Approximately across Clopton Road.

Q. To the north side of Clopton Road, do you think? A. Yes, sir.

Q. Did you see any light of any kind or any person standing on or near Clopton Road as you approached it? A. No, sir.

Q. If there had been a lighted flashlight shining on the cars that were standing on the southbound main line at that time when you approached Clopton Road, could you have seen it? A. I suppose I could have but my attention was mostly directed to eastbound traffic on Clopton Road.

Q. That is what you were there for, to protect it? A. Yes, sir.

Q. Would you have ridden that cut of cars up to Clopton Road except to protect the road crossing? A. No, sir.

Q. The movement that you made off of the hill southwardly down to the switch, through the switch and back up into slow siding northwardly— A. South of the hill and back into slow siding?

Q. Yes, was that a movement in road service or in yard service? A. I was in road service and I made the move.

Q. Was the movement made in road service? A. It was road service made within the yards.

Q. It was road service but made within the yards? A. Yes, sir.

Q. When you got down there you said that you arrived before Mr. Jones, the Yardmaster? A. As near as I can remember, I believe I did, yes, sir.

Q. And you got instructions from him as to what to do? A. Yes, sir.

Q. Was there anything unusual in his giving you the instructions as to what to do? A. No, sir; I received instructions there a number of times what to do.

Q. Are you under the direction of the Yardmaster when you get within the yard on that movement? A. Yes, sir.

Q. On the trip from Acca to South Rocky Mount on First 209, are you required to run backwards regularly on any portion of that trip? A. No, sir.

Q. However, when you were in the yard you were under the jurisdiction of the Yardmaster and you make such moves as he directs you to make? A. That is correct.

Q. In making up trains in Clopton Yard do you follow any regular routine or are you expected to go into any track or make any movements that the yardmaster directs? A. No, we are expected to make any movements the yardmaster directs to make.

Q. Is the use of any track in Clopton Yard an unusual movement so far as making up the train is concerned? A. I shouldn't say so.

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. You stated a moment ago that there was no unusual movement by the yard engine in the yard—

MR. TOWNSEND: He didn't say that. I asked him if he had been directed to go into any track would it have been unusual.

BY MR. SATTERFIELD:

Q. And you stated "No", did you not? A. That is correct.

Q. But it was unusual for you to be ordered back with the road engine, wasn't it, into slow siding? A. Not unusual. It was something I had never done before.

Q. Something you had never done before in the years that you had been with the company? A. That is right.

Q. And in the times that you had been in that yard? A. That is right.

Q. Mr. Dickens, do you tell the jury with a train running slower than 5 miles an hour you would have to run all the way across Clepton Road to kill the momentum that would be yours when you stepped off of it? A. I would say Clepton Road is about 8—I am no judge of distance. I say it is 8 or 10 feet wide and if I get off in the center of it, naturally I would take two or three steps to keep up with the movement of the car.

Q. Do you think you would have preferred a lighted yard on this night when Mr. Tiller was run down by the train that you were flagging over that crossing or would you have preferred that it be dark? A. If I had thought a lighted yard would have enabled me to see Mr. Tiller that night, I believe I would have preferred it.

Q. Wouldn't you have been able to have seen him standing there? A. I don't believe so. My contact with a lighted yard has been that it has blinded me. It has gotten in my eyes. If you work with the lights to the rear of you all the time, maybe it would be an advantage.

Q. So you are against lighted yards altogether? A. Yes, sir, absolutely.

BY THE COURT:

Q. Did Mr. Jones, the Yardmaster, give you any reason for his orders to make the back-up movement on slow siding? A. No, sir. I wouldn't ask the Yardmaster for reasons.

Q. He gave you none? A. No, sir. I just do as he directed.

BY MR. SATTERFIELD:

Q. Do you know why it was made—that move? A. No, sir.

Q. Did you know anything about the wrong classification of a freight car at Byrd Street which occasioned it? A. Not at that time.

Q. Do you know it now? A. I understand that a wrong classification had been made. I don't know it. I understand it.

RECROSS EXAMINATION

BY MR. TOWNSEND:

Q. Is there anything very unusual about an error in classification in coming into Clopton Yards? A. No, sir. I have made several yard days, what you might call yard days, that have been paid to me exclusive of my road work for setting off cars that were not in classification.

Q. You were not required to do it that night? A. No, we are not required to do it at all unless we are instructed to do so by the Dispatcher. If a car is in the wrong classification, it should have been in the right classification to start off with, and if it is in the wrong classification we are required to set Petersburg off and then get rid of our through cars before we get other Petersburg cars and then we are entitled to a yard day. I have made ever so many of those yard days.

Q. Did you make any move on this occasion that would entitle you to a yard day's pay? A. No, sir.

Q. I understood you to say that the movement you made was in road service? A. Yes, sir, road service working within a yard.

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Q. So the backward movements in the yard are very frequent? A. Yes, sir, yard or road. It is frequent but not regular movement, backing up a cut of cars. There is nothing regular about it.

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RE-REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. But you have on some occasions with the road engine made some yard movements in Clopton for which you were paid? A. No, sir, not in Clopton.

Q. Where? A. I have made a yard day at Weldon, North Carolina, and I have made a yard day at Petersburg, Virginia, and I have made a yard day at Acca.

Q. I didn't understand you to say that you had done it at Clopton Yard? A. No, I haven't done it at Clopton.

Q. The road engine has mostly been out of the way down on pass track No. 1 instead of doing any movements of any sort? A. We might be on pass track No. 1 or further on down in the yard in the clear on the main line.

Q. Making no movement at all? A. In the clear.

Q. But this time was it necessary for your road engine to aid in classifying this train in moving those three Weldon cars as it did back into slow siding? A. We didn't move three Weldon cars.

Q. Three Petersburg cars. A. I had to move the three Petersburg cars into slow siding. The yard engine, if it had done it, it would have been a yard crew making a road day.

Q. Whoever did it, they were aiding in classifying that train, weren't they? A. Not in classification of the train.

Q. They were not? A. I don't think they would be aiding.

Q. What were they doing in pushing it around? Some-

body had to push it, either the yard engine or road engine. A. Make the three Petersburg cars to get in the clear so the yard engine could make the correct classification.

Q. Weren't you already in the clear down there south of the crossover where the Yardmaster has originally sent you? A. No, sir.

Q. Why not? A. Because the yard engine had to make a move through that crossing.

Q. You were past the crossover and over it. They didn't have to go down south of the crossover? A. I believe that the yard engine had several cars behind it and in order to get out of the vision of the yard engine to the yard crew we had to move out of the way.

Q. Get out of what? A. The vision.

Q. The vision? A. Of the yard engineer to the yard brakeman and switchman.

Q. I thought it was dark in that yard that night? A. There was electric lanterns giving signals. You have to get out of the way so that the engineer could see a member of the crew giving a signal. If there was an engine and three cars blocking it, the signal wouldn't do any good. The engineer couldn't see it.

Q. It was your contention that because the engineer of the switching engine couldn't see the signals that would be given, you all came out of passing track No. 1 and went into slow siding? A. I don't say that is the reason. Maybe that was the reason, to get out of the vision of the yard engineer.

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ERNEST H. WAMACK, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. Are you an employee at the Atlantic Coast Line Railroad Company? A. Yes, sir.

Q. In what capacity? A. At the present time Yard Foreman.

Q. How long have you been in the employ of the company? A. Twenty-six years.

Q. Did you know the deceased, Mr. Tiller? A. Yes, sir.

Q. How long had you known him? A. About eight years.

Q. Did you see the deceased, Mr. Tiller, on March 20, 1940, the day of this accident? A. Yes, sir.

Q. Where? A. I saw Mr. Tiller first at Byrd Street Yard.

Q. Do you recall about what time? A. About 6 p. m.

Q. Was that before the yard engine had moved the train of freight cars, which is known as First Section 209, out of Byrd Street Station? A. Yes, sir.

Q. Were you assigned as a member of that crew, that yard engine crew? A. Yes, sir.

Q. As what, Mr. Wamack? A. As a switchman.

Q. That train left with the crew on it from Byrd Street Station. Did that include you? A. Yes, sir.

Q. Mr. Tiller? A. I don't know whether Mr. Tiller rode the train or not. I couldn't say.

Q. Did you see him after he got over in the yard that night? A. After we left the yard I didn't until we arrived at Clopton.

Q. Until you arrived at Clopton? Where did you see him then? A. I seen him after he had been hurt.

Q. You spoke with him at Byrd Street Station, did you not? A. Yes, sir.

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Q. How many cars did you all pull over there? A. Approximately, I would say, about forty.

Q. And you were riding on what part of the train? A. On the engine.

Q. On the tender or on the engine? A. On the tender.

Q. Is that the step that is at the back near the ground at the rear of the tender? A. That is right, on the tank. We call it the tank. We were riding on the safety rail.

Q. As your train came into Clopton Yard, what track was it using? A. Old southbound main line.

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Q. I will change the question this way : As you approached and went over Clopton Road, about how fast was he going southward on the southbound rail? A. I will say from 6 to 8 miles.

Q. Was any other train moving on any track nearby at the time you crossed over Clopton? A. Not to my knowing.

Q. Did you see the road engine that Mr. Myrick was engineer of? A. First 209 was standing on the hill as we crossed over the Clopton Road crossing.

Q. Where were you when the accident occurred? A. The accident? I don't know when it happened.

Q. And did you at any time see the road engine backing down into slow siding? A. After we passed the road crossing.

Q. Were they then backing into it? A. Into what?

Q. Slow siding. A. After the train had stopped and I had made the cut, I observed First 209 engine backing down into slow siding.

Q. After you made the cut what happened to the switching engine with the cars that it was holding onto? A. After I had made the cut I gave a signal, back-up signal, and that was proceeding south but the switchman, Mr. King, and Mr. Elke was at the switch which we were to enter and that was about probably six cars.

Q. So those cars with the switching engine backing back— was it? A. Yes, sir.

Q. When you came over from Byrd the tender was in front of the engine? A. That is right.

Q. In other words, the switching engine didn't come over from Byrd headon? It had its head to the cars and the tender was the leading end of the movement? A. That is right.

Q. Those cars moved, did they not, at or about the same time that Mr. Myrick's engine started backing into slow siding? A. They were pulling out. After we had made this cut, pulling out, I would say they were both making the movement at practically the same time.

Q. They were passing in opposite directions? A. Yes, sir.

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Q. How much of your time have you been assigned to yard service in Clopton? A. My assignment is daily that I go to Clopton. I have different assignments. Some of them you will probably be working in Clopton Yard every day for thirty days and then again it may be a time that thirty days we wouldn't even get to Clopton Yard.

Q. Have you averaged as much as half of your twenty-four years working in Clopton Yard? A. I think that would be a very good estimate.

Q. Have you ever been a member of the road engine crew of First 209 from Acca? A. Yes, sir.

Q. Have you ever in your whole experience on that yard known the road engine of First 209 to make a back-up movement similar to the one that was made on the night of March 20, 1940? A. I can't recall any specific instances that I made that move as far as backing up.

Q. You cannot recall a single instance? A. No, sir, I can't recall.

Q. Did it ever make such a move while you were a member of the road engine crew of First 209? A. No. At the time I was a brakeman on 209, as we term it, the train wasn't made up in that way. It was made up at the lower end of the yard, the south end of the yard instead of the north end of the yard.

Q. What was the usual routine movement that was made by the road engine when it came over to wait for the making up of the train by the switching engine from Byrd Street? A. The usual move would be that the road engine of First 209 would cut off, probably the engine by itself or probably one to ten cars, and they would get out of the way so that the yard engine could complete the classification of the train.

Q. To get out of the way where did it usually go? A. Sometimes the southbound main line, sometimes No. 1 track, sometimes No. 2 track which paralleled each other.

Q. Is that south of the crossover? A. That is south of the crossover.

Q. Is that south of Clopton Road? A. That is south of Clopton Road.

Q. Is that south of the switch that it would have to come into if it were going to back up into slow siding? A. Yes, sir. All of those movements would be south.

Q. Did you on any occasion that you can recall, when you were working in yard service and 209 was being made up, observe the road engine make a back-up movement such as was made that night on March 20, 1940? A. I have observed from time to time over a period of years 269, after waiting a certain length of time, would back down through the lower siding and probably go to the water tank or it is possible that he would back down in slow siding to let another train go up the main line, the old line that he was holding.

Q. Weren't they usually south of the crossover—the road engine? A. If he backed down the slow siding to go to the water tank, it would have to be a northward movement.

Q. If he was south of the crossover, wouldn't he be out of the way? A. If he was south of the crossover!

Q. Yes. A. Yes.

* * *

Q. I am not asking you that question. I am asking you from your experience was that a usual or unusual move for that engine that night? A. Unusual move?

Q. Yes. A. They seldom ever backed down there if they have anywhere else to go.

Q. Are you acquainted with any rule of the company which deals with proper flagging, requiring the man on the lead end of a back-up movement to get off of the lead end and walk across the crossing? A. Yes, sir, we perform that duty.

Q. Is that a rule of your company? A. I wouldn't say it is in the rule book but it is a bulletin issued.

Q. Has it been posted on the bulletin boards of the Atlantic Coast Line? A. I think it has, yes.

Q. Do you recall reading it on the bulletin board? A. I recall reading it. That is where I got my information, yes, sir.

Q. Will you explain to the Jury what a bulletin board is in a railroad yard office? A. A bulletin is a supplement to the rule book. It supersedes the rule book.

Q. When did you read the bulletin that I have asked you about? A. I just can't recall the year but I would say about 1918 or '17.

Q. What did that rule, promulgated by being posted on the bulletin board, require? A. It required that approaching public crossings, unless protected, that it should be preceded by a flagman to flag over the crossing.

Q. Preceded by a flagman and what was he supposed to do? A. Stop the traffic.

Q. What about the train? Was it to move while he flagged the crossing? A. They come to a full stop before approaching the crossing. You come to a full stop when approaching a crossing. Before crossing that crossing you have a flagman in the middle or near the middle to protect the highway and then when it is clear you proceed.

Q. Was that a continuing rule of the company on March 20, 1940? A. It was still in practice, yes, sir.

Q. Was that a public highway, Clopton Road? A. Used by the public.

Q. Was it protected by a watchman or by signal flags of any sort? A. No, sir.

Q. Are you acquainted with the rules issued by the company in its rule book? Have you got your rule book with you? A. No, sir. Generally I am acquainted with them.

Q. They are issued to you and they are serially numbered so they keep tab on to whom they are issued; is that not a fact? A. That is right.

Q. How often are you required to go over these rules yearly to familiarize yourself with them? A. Twice a year.

Q. Is there any stated time that this examination takes place? A. I don't know but I think the I. C. C. requires the company to have a review of the rule book among the employees twice yearly.

CROSS EXAMINATION

BY MR. DENNY:

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Q. Is that a bulletin that applied all over the line or was that a bulletin that applied to the corporate limits? A. It is a bulletin that applied to Richmond yard.

Q. By Richmond yard do you mean the part within the corporate limits or all the way down to Falling Creek?

A. All the way down to Falling Creek. The yard limit board is beyond Falling Creek.

Q. Who is it that issues a bulletin of that kind? What official? A. Well, it could be the General Yardmaster, Terminal Trainmaster or the Superintendent.

Q. Mr. Murchison, I believe, is Superintendent and was Superintendent at that time, was he not? A. At the time this bulletin was issued, I don't think Mr. Murchison was Superintendent. I think Mr. E. P. Laird was Superintendent.

Q. So if Mr. Murchison did not become Superintendent until around about 1934, is it your opinion that that bulletin was issued prior to 1934? A. 1934?

Q. If Mr. Murchison did not become Superintendent until 1934, is it your opinion that the bulletin was issued prior to 1934? A. I think the bulletin was issued prior to 1934 but I think that the bulletin was issued over the signature of Mr. E. P. Laird and, just as I said, it would imagine it was somewhere between '37 and '38.

Q. Mr. Laird preceded Mr. Murchison as Superintendent, didn't he? A. Yes, sir.

Q. And since Mr. Murchison became Superintendent no bulletins on matters of that kind had been issued by Mr. Laird? A. That is right.

Q. You have said that your recollection of this is that it called upon the engineer to stop and a trainman go on the public road and flag it over unless the crossing was otherwise protected. If astride the crossing on a parallel track there are cars standing so as effectively to block the

crossing, is that crossing protected or is your interpretation of the rule, as you recollect it—

MR. SATTERFIELD: I am going to object at this point. I think the witness can state what the rule is and I don't think that it is proper for him to say what his interpretation of the rule is. He can state what the rule is and what he has done, if anything, under the rule but I don't think he is called upon to pass upon either the efficacy of the rule or what it means except to state what it is.

MR. DENNY: I think, if the Court pleases, that this witness is testifying from memory concerning a rule which he cannot quote and that I have a perfect right to ask him whether the rule as he recalls it applies to a particular situation. In this particular case the evidence shows that Clopton Road was blocked and I think I have a right to ask him whether the rule as he recalled it would have required stopping and flagging over when Clopton Road was blocked.

THE COURT: Objection overruled. Go ahead.

A. What was the question?

BY MR. DENNY:

Q. I will state the question again. As you recall this rule, would it on this night have been required the engine of First 209 to stop before backing cars across Clopton Road in view of the fact that the crossing was completely blocked by part of it standing on the southbound main line and the fact that Dickens was right at the lead end of the back-up movement with his lantern? A. A crossing, in my opinion and my daily duty, if it is blocked, if there are three tracks and one of the tracks is blocked, it is sufficient evidence to the public that he can't get by and I will cross the other tracks without protection.

Q. Without stopping? A. Without stopping for the crossing, yes, sir.

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Q. Do you under those conditions have any rule that

would have required you to stop, go out on Clopton Road and flag the train over? A. I have answered that question previous to that. If that crossing was blocked I assume that I have a perfect right to switch over it or make any movement on the other track that I see fit.

Q. I understand you to say, Mr. Wamack, that the yard engine coming from Byrd Street was backing up pulling its cars and you and some of the rest of your crew were standing on the little platform or passageway at the rear end of the tender which would have been right at the very front of your movement. Am I correct in that? A. Yes, sir.

Q. Who was on that tender with you? A. Yard Foreman Ellke and Switchman King.

Q. The engineer and the fireman were, of course, in the cab? A. That is right.

Q. And that made up your whole crew, did it not? A. That is right, engineer, fireman, conductor and two switchmen.

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Q. How far did your engine go south of Clopton Road before stopping? A. How far did the engine go?

Q. Yes, about how many car lengths as an estimate? A. I would say about 22 cars.

Q. After your engine came to a stop did you receive any instructions from anyone? A. Our move in leaving Byrd Street Station was that we was to go to Clopton as we were talking about and then we cut off a cut of cars ahead of First 209. Then we proceed to the lower end of the yard. Arriving at Clopton, I dropped off to make that cut and I was informed by the Yardmaster, W. J. Jones, that he had a car to cut out and told me the number of the car and where it was. That car had to be placed on First 209 train standing on the hill from Acca. That made two more cars than I would ordinarily have held to. I cut that car off and made that move.

Q. About how many car lengths south of Clopton Road was it that you made this cut? A. About five cars.

Q. There is nothing unusual in your having to cut off a single car and push it around in the make-up of this train, is there? A. That is my duty from the time I go on duty until I get off.

Q. You are doing that constantly? A. Constantly, yes.

* * * * *

Q. After you had made your cut on southbound main line here about five car lengths south of Clopton Road, your yard engine with about 22 cars pulled on down south and left the rear portion of that train standing astride Clopton Road, didn't it? A. That is right.

Q. What did you do when your yard engine and those front 20 or 25 cars pulled out? A. What did I do?

Q. Yes. A. After making the cut, cutting off and leaving those cars there, I walked over on the west side of the line of switches to go up on the hill.

Q. You mean on the west side of the southbound main line? A. Yes, sir.

Q. Into the area between the southbound main line and slow siding? A. That is right.

Q. When you stopped over there what was the road engine doing? A. The road engine was, as well as I can remember, in motion to make a back-up move. I was coming in on a forty-five.

Q. What do you mean by coming in on a forty-five? A. I mean the five car lengths that I was, I would have to walk down from the end of my train that was left to walk over to the switch so I was above the movement this engine had came off of with the three cars off the old line and was in a position to back down.

Q. As you stepped across approximately five car lengths south of Clopton Road, was that movement then going on on slow siding right opposite you? A. That is right.

Q. In other words, if you had tried to step on slow siding you would have walked right into Mr. Myrick's movement, wouldn't you? A. The five cars above here puts you above

this switch. That is where I gave you the idea of walking on a 45. I would say his engine had made the move and had passed the three cars above that switch, that switch right there, and then when I walked over he was backing down.

Q. In other words, five car lengths takes you down in the neighborhood of this switch? A. Just about probably 35 or 40 feet above it.

Q. As you stepped across there, right in front of you was Mr. Myrick's engine making his back-up movement? A. The engine had passed me approximately. It was backing down. He had passed me probably 10 to 15 to 20 feet.

Q. And at that time that he was backing up the rear portion of the cars you had brought from Byrd Street were standing still? A. That is right, where I left them at.

Q. Mr. Wamack, as you stepped across into the area between the southbound main line and slow siding, you were planning to go up on the hill to make the coupling to be made up there, were you not? A. My idea was to throw the switch, to see that the switches were lined up.

Q. Did you come in south or north of that switch? A. I come south of the switch.

Q. So that to go to the switch you had to walk right straight up toward Clopton Road, north toward Clopton Road. Did you see, when you got into that area with your face toward Clopton Road, any sign of a man with a flashlight up around Clopton Road or did you see any sign of the beam of the flashlight? A. No.

Q. I understand for a long period of time, for a number of years, about half the time you have been working in Clopton Yard either with the yard engine or with the road engine and had been there numerous times when First 209 was being made up; is that correct? A. Yes, sir.

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Q. Is there any regular routine followed each evening? A. No. At the present time we make it up on No. 1 track, in No. 2 track, No. 3 track and No. 4 track and sometimes

northbound main line and possibly southbound main line.

Q. Is there anything unusual in the make-up of freight trains in the yardmaster directing movements to be made, convenient movements to be made on any track that there is there and open? A. Nothing unusual about that, no, sir.

Q. I speak of the period prior to the accident to Mr. Tiller. I understand you to say that you have seen on a number of occasions the road engine back into slow siding; is that correct? A. Yes.

Q. On a number of other occasions you have seen the road engine go into No. 1 track, have you not? A. Yes.

Q. No. 2 track? A. Yes.

Q. On down to the south end of the yard? A. Yes.

Q. Indeed, you have seen practically every track that is in the yard used in the make-up of that train, have you not? A. Yes, sir.

Q. Mr. Wamack, was the movement made by First 209 in getting out of the way, that is coming down off of the hill and backing into slow siding in order that the yard engine might make up the train, a movement by 209 road engine in yard service or was it a movement in road service? A. That movement was road service. We have an agreement, in fact, a labor agreement, that a road man can't make any moves within yard limits. In other words, he can't make any switches in yard limits.

Q. He gets paid extra if he does, does he not? A. Yes.

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. You were answering some questions, a number of them, a moment ago about the regular routine. I understood you to say in response to a question asked by Mr. Denny, or a number of questions, that there was nothing regular about the routine over there in making up 209 in the yard. That is true, isn't it? A. That is true.

Q. But does that apply to the movements of the road

engine. First 209? A. To the movements that 209 makes at the time of this accident?

Q. At the time this train is made up, isn't it a fact, when 209 is being made up for the road engine to go south with it, that there is a routine movement for the engine that Mr. Myrick was handling that night? A. At that time?

Q. Yes. A. The routine was that 209 would cut off and either use the main line, No. 1 track or No. 2 track, if open.

Q. That was routine? A. That was generally what they did.

Q. Isn't it a fact that the unusual movement was the back-up by that road engine into slow siding? A. Well, if I interpret the word "unusual", I don't know how you ought to term it.

Q. Unusual for 209, the road engine—not unusual for the yard engine but wasn't it unusual for the road engine to make that move? A. The road engines generally went in No. 1 or 2 or the southbound main line.

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Q. You have described to the jury the usual movement of the road engine and I will ask you now, Mr. Wamack, was it a usual movement of the road engine to back into slow siding as it did on this night? A. The usual move of the road engine is to go down in No. 1 which ordinarily is always open. Should No. 1 be blocked, No. 2 is open.

RE-CROSS EXAMINATION

BY MR. DENNY:

Q. When you say the usual movement is to go into No. 1, do you mean it goes into No. 1 or No. 2 a majority of the times? A. That is right.

Q. You do not mean that it goes in there with such uniformity that it is almost unprecedented for it to use other tracks? A. Well, there is a series of tracks.

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By Mr. DENNY:

Q. Can you give the jury an estimate of the number of times per month along about this time that Mr. Tiller was killed that the road engine might go into slow siding? A. I happened not to be out there every day.

Q. According to your experience out there. A. It seldom ever did.

Q. Mr. Wamack, you testified in this case before, in September of 1941, didn't you? A. Yes, sir.

Q. I read from your testimony taken at that time, page 61, direct testimony in response to questions, I think, of Mr. Satterfield:

"Q. Mr. Wamack, in all your experience there in the yard was not that an unusual movement made by Engineer Myrick that night? A. No, I wouldn't say it is unusual. It has happened before.

"Q. How often before? A. I wouldn't be able to estimate that but quite often we make that move.

"Q. How often have you been on that particular run handling those trains 209? A. Ever since 1921.

"Q. How many times in the last two or three years? Mr. Tiller was injured in 1940. Let us say for the years 1938 and 1939 or two years prior to 1940, how many times would you say a year that you were on that assignment? A. Well, I could easily estimate half of the time.

"Q. Half of the time? A. Yes.

"Q. How many times would you say per month you would make that move to get a car out of the wrong classification and use that slow siding in a back-up movement as Engineer Myrick did on that occasion? A. How many times would we make that movement?

"Q. Per month that you would make that exact movement? A. We have about half of the time a classification to make on the two trains.

"Q. I am not speaking about since 1940; I am speak-

ing of prior to 1940. A. I don't think I would be able to say as to how many times.

"Q. I mean roughly, from your recollection, how many times would you say you would do it per month, the exact move that Engineer Myrick made on that evening, March 20, 1940, two years prior to 1940? A. I would say it may happen ten times a month or it may happen fifteen times per month or it may not happen in two months.

"Q. Let us take it over a period of six months. Would you say it averaged more than three or four times a month or two or three times a month, year in and year out? A. Well, it would be hard for me to say."

Two years ago when you were on the stand you testified that for a period of two years approximately prior to Mr. Tiller's death the back-up movement might be made into slow siding ten or fifteen times a month and again it might not be made for a month. Now you say it was very rarely made. Which time do you think you were the more likely accurately to recollect, two years ago or today? A. I just can't term the word "Unusual". I don't see anything unusual about that. I don't understand the word you all term "unusual". In other words, to me the tracks are there and we use them any time we want to.

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Q. Do you think two years ago when you testified that along during the period immediately prior to Mr. Tiller's death, two years prior thereto, there were occasions when a train was backing up in slow siding, Mr. Myrick's train, a road engine, ten or fifteen times a month and other times it might not go in there for a month at a time? A. That is right.

RE-REDIRECT EXAMINATION

By Mr. SATTERFIELD:

Q. Mr. Wamack, Mr. Denny is attempting to contradict you on the testimony that you made here two years ago. My

attention has just been directed to this. You were asked this question about the unusual movement made by Engineer Myrick, and I want to ask it to you again:

“Q. How many times would you say per month you would make that move to get a car out of the wrong classification and use that slow siding in a back-up movement as Engineer Myrick did on that occasion?”

What did you understand that question to mean? A. I understood the question was he was asking about the moves that First 209 made, that is Mr. Myrick's engine, and then you proceeded with a question as to what I did.

Q. What do you mean by “I did”—in what capacity?

A. As a switchman or conductor in charge of a crew. As to using those tracks, I make moves over there practically every tour of duty I work.

Q. Were you referring to the yard engine? A. To the yard engine.

Q. I will ask you the same question and only refer to the road engine. Was that an unusual movement to be made by the road engine, not the yard engine? A. That unusual move, just as I say,—I still don't get the “unusual” but the usual move would be that the engine would take No. 1 track, No. 2 track or the southbound main line.

Q. And not slow siding—the road engine? A. Well, it is possible that they use it because the track is there and we use any track.

Q. How many times did you ever use it with that road engine? A. I don't ever recall ever using it with the road engine.

Q. Speaking of your own experience, you don't recall in the time you have been with the Coast Line that you have used that slow siding when you were a member of the road engine crew; is that correct? A. I have only been about seven times on First 209 out of Acca.

Q. Whatever time, it is the only time you have ever had any experience with it? A. At the time I was going there

the train was made up at the lower end of the yard. It wasn't made up on the hill.

Q. Wherever it was made up, whether it was made south of Petersburg or north of Petersburg, how many times have you seen that road engine go in there with cars as Mr. Myrick went in there with this road engine on the night that Mr. Tiller lost his life? A. I couldn't recall any time any more than any definite number of times. I have seen them back down to the water tank after waiting a certain length of time.

Q. I am talking about when 209 was being made up. A. I can't recall it going in there that I know of.

RE-RE-CROSS EXAMINATION.

BY MR. DENNY:

Q. What did you mean then when you testified to the jury before—I will read again the question and answer:

“Q. I mean roughly, from your recollection, how many times would you say you would do it per month, the exact move that Engineer Myrick made on that evening, March 20, 1940, two years prior to 1940? A. I would say it may happen ten times a month or it may happen fifteen times per month or it may not happen in two months.”

Did you mean that the road engine, sometimes as much as ten or fifteen times a month, would back into slow siding and sometimes the road engine wouldn't use it for two months? A. I understood the question to be how many times that I would make that move.

BY MR. SATTERFIELD:

Q. As what—yard or road? A. As yard engine.

BY MR. DENNY:

Q. Have you seen the road engine make those moves into

slow siding? A. I have seen them back down to the water tank, yes, sir, and I have seen them back in the clear.

Q. And I suppose you have come through on your yard engine backing in there when the southbound main line and other tracks have been blocked, have you not? A. Yes.

Q. Have you seen the road engine back in there when No. 1 and No. 2 were blocked? A. I can't recall any time.

Q. Mr. Wamack, have you worked both in lighted and unlighted yards? A. Yes, sir.

Q. Will you state from your experience as a trainman whether you find the work is more easily and you think more safely done in a lighted yard or in an unlighted yard, from your experience? A. In my experience I prefer a dark yard.

Q. Why? A. Well, in a dark yard if you go on a tour of duty at 4 p. m. in the afternoon and it gets dark and your eyes become accustomed, you can watch everything. On a lighted yard if you come out of a dark yard into a lighted yard you are blind, you can't see where you are going.

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Q. What are the difficulties, if any, do you notice in a lighted yard? A. Cutting cars and you walk into a direct light that is focused down on both ends of the yard and your eyes are not focused to it and you really can't see and you turn around away from that light and you are in the dark. You can't see anywhere you are going. You just have to judge and feel where you are going.

By MR. SATTERFIELD:

Q. Will you tell the jury where Tiller was accustomed to stand when he would check those freight cars as they went through the yard? A. What do you mean? In pulling out of Clopton?

Q. Yes. A. My observation over a period of years is that Mr. Tiller always dropped off about fifteen cars, 40-foot car lengths, away from Clopton Road crossing and anywhere from there up to the road crossing I have observed

him dropping off there when we was making that move as we did then because he practically would be at the head end of the train and then they would let the train pull by and he would walk back to the rear.

Q. Where was that position with reference to slow siding?

A. On the slow siding on the west side of the southbound main line, anywhere between fifteen—he generally would get off before he got to the switches.

Q. Between the tracks or on the tracks or where? A. He would have to get off between the slow siding and the southbound main line on the west side.

Q. Do you know any particular reason why this move was made that night on slow siding? A. No, sir, I don't know.

Q. You do not know why it was made? A. No.

BY MR. DENNY:

Q. Mr. Tiller, according to your observation, followed a regular routine in his work there in the yard? A. No, sir.

Q. Have you seen Mr. Tiller doing his work at almost every place in that yard? A. Yes, sir.

Q. Did Mr. Tiller come to that yard by the same means every night? A. Clopton Yard?

Q. Yes. A. No, sir.

* Q. What were the different ways Mr. Tiller came to the yard? A. I have seen him drive his own automobile and I have seen him come out—not come out but I have seen him ride on the train and go back with Mr. Jones, the Yardmaster.

Q. Have you seen Mr. Tiller checking the seals of the cars of the train he was to guard all the way from Byrd Street, at various places from Byrd Street down to the south end of Clopton Yard? A. Yes, sir.

Q. You didn't, unless you happened to see Mr. Tiller, know what part of the yard Mr. Tiller was in. Did you have any reason to know what part he was in? A. No, sir.

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C. D. HUBAND, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. Are you an employee of the Atlantic Coast Line Railroad Company? A. Yes, sir.

Q. You are employed by that company in what capacity? A. As a yard conductor. At one time it was foreman but the old term is yard conductor.

Q. How long have you been an employee of the Coast Line? A. Thirty-five years last March.

Q. During that period of service with the Atlantic Coast Line, how much of it has been spent in service in Clopton Yard? A. Clopton Yard is a mixture of the Richmond yard. We call all Richmond yard from Richmond at Byrd Street to Falling Creek and we have Richmond yard, South Richmond yard, Clopton Yard and Falling Creek but they all come under the same territory as Richmond yard.

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Q. Of the time that you have been in the service (I believe you said thirty-five years) let us restrict it by saying how much of those thirty-five years have you spent in service in the area of Clopton Yard where Clopton Road passes over the railroad track near Meadow? A. I was clerk up until 1915, November, 1915, when I went in braking service and I had clerked at Clopton Yard up to that time and after 1915 when I went braking, naturally we would go through all of this territory at all times. When we start out on a yard, that is our yard—in other words, take Clopton Yard would take us to Falling Creek Yard and that is the way we worked but it is all within the one yard limit. It is the only territory assigned so we will know exactly where to get the cars or take them from.

Q. Since 1915 you have been in road service? A. In switching service.

Q. As distinguished from office work? A. Yes, sir.

Q. Since 1915 have you had assignments of duty in Clopton Yard proper? A. I was the Yardmaster during the last World War in Clopton Yard but exactly the term of it, I can't say. It was somewhere in the neighborhood of near about a year that I served as Yardmaster at Clopton alone.

Q. Since then what have you been doing? A. Since that time I have been working as yard foreman up until 1929 and was cut back to braking and still braking within Clopton Yard territory and running crew some and running crew regular since about 1936 or '37.

Q. Then in the last fifteen years you have been in and out of Clopton Yard a good deal? A. Yes, sir.

Q. Have you been called for service with 209 that comes out of Byrd Street Station in any of that time? A. I worked the assignment from 3 to 11 about three years and built 209 up practically every day except some days I would get off. We all get off sometimes to take recreation, but in the thirty-day period I would say I would make around twenty-five or twenty-six days.

Q. On that assignment? A. Most of the time, yes, sir, I was on building 209 train up.

Q. Were you assigned for duty on the switching crew or road engine crew? A. No, I was on yard switching. I have no rights on the road at all.

Q. Are you familiar with the regular routine followed by the road engine when it comes over with its section of cars from the R. F. & P. yards at Acca incident to the making up of First 209 for South Rocky Mount, North Carolina? A. Well, sir, I will have to answer that and say as long as I have been there in regular service that I have put in there, I am used to all the moves that we make on 209 in between Clopton and Falling Creek.

Q. What is the usual move that the road engine makes when it comes over with a cut of cars and stops on the hill to get its first orders from the Yardmaster incident to mak-

ing up train 209? A. That is kind of a long story. You want it all, I reckon?

Q. Yes.

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Q. Will you please speak of it as the road engine. The road engine would do what? A. First 209 road crew would pull down to the road crossing at Clopton. That is approximately, I reckon, 150 or 175 feet from the switch but would clear this public road crossing, so they would stand there until they get instructions what move they should make in order that we should classify their cars in proper classification. So, as I tell you, before I left Richmond, when I get off there, if the Yardmaster hasn't arrived I instruct the road crew how many cars to hold onto, if any, and where to go if the situation demands where he goes, and most of the time we let him go down in No. 1 track south of the cross-over. In some cases where No. 1 was blocked we let him go in No. 2 track and leave room there and then we would make the switch in his train and classify his cars so that when he coupled to his cars on the main line his train would be classified so when he arrived at Collier, which is the Petersburg destination, he could set off his Petersburg and hold onto his Weldons—did you get me right on that move?—set off his Petersburgs and hold onto his Weldons and then pick up what south cars he had to pick up from Collier which would fill his train out into Rocky Mount and that was the usual move there.

Q. Your yard engine assembled the train for the road engine? A. That is right.

* * * * *

Q. I will ask you this question: Was it a usual movement for the road engine to back up with some cars in a back-up movement and back down into slow siding? A. No, sir.

Q. Have you ever heard of that movement being made? A. I wouldn't like to say that I haven't heard of it being made because we do make moves on the yard very irregular

but it was a very unusual move if it was made that way that night. I couldn't say it was done that way and I don't know why the conditions were made that way. If I had been there and No. 1 had been open or No. 2 had been open, I would have put him in one of those tracks. I don't know anything about the conditions of why the movement was made that way that night.

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Q. Did the railroad company have any difficulty with thieves stealing property between Byrd Street Station and Clopton Yards on some occasions? A. Yes, sir, they did, on several occasions and Mr. Tiller asked us and Mr. Angle—Mr. Angle is another detective—asked us to help them if we seen any shoe boxes or anything laying in our territory because they had found thieves had put a ladder down off the side of the car and broken into the car.

Q. What kind of ladder? A. A rope ladder on top of the cars and broken the seals on the run. That was only hearsay.

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Q. Mr. Huband, will you tell the jury whether or not you are familiar with any rule of the company which required a man on the leading end of a back-up movement going over a highway crossing which was not protected by a watchman or some set of signals? Do you know of any such rule of the company? A. Yes, sir.

Q. Will you tell the jury what you know about that rule, sir? A. Well, the rule is something that I can't quote out and out because—I know the rule and know how to live up to it but to state the rule exactly—it says, "Except when switching in yards, a lamp by night or signal by day or trainman by day"—I have forgotten exactly how that reads—"should be on the leading car except in switching in yards but when the move is made over grade crossings not protected by a watchman, trainmen must protect the crossing."

Q. Does the rule require the stopping of the train and flagging it over? A. That rule there does not say "stop the

train." That rule does not say "stop." It says it must be protected by trainmen.

Q. All the way across the crossing? A. I should say that it would mean all the way across the crossing. It says the trainmen must protect the crossing.

Q. Where did you first become familiar with this rule? A. I first became familiar with it when I filled out the rule book in 1915 of the yard conductor. We have to fill that examination before we pass from trainman to conductor.

Q. Do you know anything about a rule that was reissued by the company and made a part of the rules by bulletin?

A. That same rule regarding shoving cars over crossings, sometime back in Mr. Darrell's time—Mr. Darrell was Superintendent of transportation.

Q. When was that? A. Eleven or twelve years ago, around 1930, in the '30s, Mr. Darrell came up here to a safety meeting and in the safety meeting each employee there is called on to give his sentiments in regard to the safety items and the road crossing proposition was brought up at the time, that they ignored our signals and run on across ahead of us and Mr. Darrell called attention to the rule and said that was taken care of and it was up to us to be safe because we were supposed to protect these crossings and he issued later, or Mr. Laird, our Superintendent, reissued a bulletin instructing us that this rule was in effect and we must live up to it and it went a little further and said we must stop at road crossings and flag them if they are not protected by a watchman or signal indication.

Q. What does that mean—"Stop at road crossings not protected by a flagman"? What do you have to do to flag it across safely? A. Our construction of it is that we stop before we touch the crossing and get down and get on the crossing and stop all vehicles or people crossing and then flag our own train across.

Q. Did you understand that rule to be in effect when one side of the road was blocked by a train or would that affect it? A. Well, sir, I don't think it would protect me if I hit

someone if the road crossing was blocked on one track and I didn't protect the other.

Q. What do you mean—it wouldn't protect you? A. Say this train was on the southbound track that night; if I had been moving on the other track and went ahead over the crossing and somebody or a car had run over that crossing and I had hit him up at that crossing, I don't believe it would protect me from being criticized for hitting him. That is my opinion of the rule. I do live up to that rule of flagging these crossings.

Q. Was any suggestion made to you by an officer of the company that the rule not be followed any further? A. When I was a local chairman handling grievances for the organization back about a year after this, there was some complaint made that it took us too long—

MR. DENNY: May it please the Court, I object to testimony of matters occurring since 1940. They have no pertinence to this case.

THE COURT: What he related happened in 1940?

A. No, sir.

BY THE COURT:

Q. When did it happen? A. It happened after this special instruction was issued regarding the flagging of these crossings by trainmen.

MR. DENNY: I understood he meant at the time Mr. Tiller was killed.

BY MR. SATTERFIELD:

Q. What was said to you? Did anyone talk to you about this—an officer of the company? A. Yes, sir.

Q. Was who it? A. I was getting to that but the gentleman stopped me. In handling these grievances of the trainmen, that it was too long and our Yardmaster's idea of

getting from Clopton to the shops with cars ahead of him—he explained that he had to stop at each one of these crossings and flag and the Yardmaster took issue with him and told him it wasn't necessary.

Q. Who was the Yardmaster? A. Mr. O. S. Marsh. I handled the case with the superintendent the next day, Mr. E. P. Laird, and Mr. Laird asked me was it necessary to stop at all the crossings and I admitted that it might not have been necessary but the rule had been bulletined and we must live up to it. He said, "Couldn't you stand on the car and put your fingers in your mouth and whistle?" I said, "No, sir; I will have to admit as a boy I couldn't whistle and I can't yet," and he didn't like it at all because we insisted that we were going to stop.

Q. Is that rule still a rule of the company, so far as you know? A. So far as I know, we flag these crossings where we have cars ahead of us and no watchman or no signal is working, yes, sir.

Q. When these bulletins are issued are they posted from day to day in the office of the railroad company? A. Our rules tell us before we go to work each day or take our tour of duty, we must read the bulletin board and accustom ourselves thereto.

Q. Do you have to do anything else in connection with it? A. We have to sign our names to these bulletins and the date and time that we read them.

Q. Each day? A. Yes, sir.

Q. Was this rule in any way a part of that bulletin board? A. Yes, sir, it was at that time. I haven't seen it for a long time.

CROSS EXAMINATION

By MR. DENNY:

Q. Mr. Huband, have you a copy any place of this rule to which you refer? A. You have the only copy that I have had today and I have a copy at home, yes, sir.

Q. You are referring to the rule book? A. No.

Q. I am referring to the rule posted on the bulletin board.

A. No, sir, I am not allowed to take those bulletins off of those bulletin boards. They are put on there by the superintendent or the yardmaster and I only have to sign them. I am not allowed to take that copy.

Q. Did you mean to say that a higher official of the company in the service seriously suggested to you that you violate the rules of the company? A. Yes, sir, when it comes to that whistling at that road crossing, I will tell you that he did.

Q. And how long ago was that? A. I stated a while ago it was in the '30s. I haven't got the date right now.

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A. Mr. Marsh was the Yardmaster and Mr. Laird the Superintendent.

By MR. DENNY:

Q. And the two of them suggested to you that you ought to violate this rule about protecting the road crossings?

A. I didn't say Mr. Marsh asked me to violate it. Mr. Marsh had us in his office for not violating it. Mr. Laird said that a whistle signal was a plenty.

Q. Was Mr. Laird then Superintendent? A. Yes, sir, of the Richmond division in Byrd Street Station.

Q. Mr. Murchison has been Superintendent since 1934, hasn't he? A. He has been superintendent a long time but I don't keep these dates.

Q. And this incident to which you referred took place prior to the time Mr. Murchison became superintendent?

A. Yes, sir. I didn't know Mr. Murchison at the time.

Q. Have you also worked at night in lighted railroad yards? A. No, sir, I have been to Acca in that lighted yard and got a train out of there.

Q. Have you been there often? A. Yes, sir.

Q. From your experience in working in these unlighted yards and in working in the lighted yard at Acca, which

type of yard do you find is easiest to do your work at night in and which type safest? Do you like the lighted or unlighted yard? A. Never having switched in a lighted yard, I wouldn't know that, but I know this: I can see farther and see a person further in a lighted yard but in a dark yard—I have only switched in a dark yard. In Acca we didn't switch. We would go over there and get in the cab on the train and come out.

Q. Do you know whether you can see the signals better in a dark yard or lighted yard? A. You refer to hand signals or drop signals?

Q. I refer to hand signals. You operate your trains at night by hand signal lamps, do you not? A. But you didn't say what kind of signals.

Q. You are correct. A. My experience is that unless you get direct within the ray of one of those lights in Acca Yard, you can see better in a dark yard—see a lamp further in a dark yard.

Q. Mr. Huband, assume that at about 7 to 7:15 on March 20th a cut of cars was standing on the southbound main line across the Clopton Road so that they had Clopton Road blocked and that an engine is about to back three cars north on slow siding across Clopton Road and that a brakeman holds on to the lead end ladder on the west side of the back-up movement with his lantern, riding it all the way to Clopton Road, he being, of course, on the engineer's side. Assume those conditions, the blocked road and the brakeman riding the head end of the back-up movement with his lighted lantern, would you say that that brakeman properly protects that crossing under those conditions? A. I would say the same thing I told you before that he protected that crossing from the west side because he was on the west side and he had four track lengths of clear track and he could see there wasn't anything coming.

Q. Then your answer to that question is that under those conditions a brakeman riding the head end of a back-up movement as I have described was properly protecting the

crossing? A. I think in the conditions with the crossing blocked so that nothing couldn't get to him on the east and he could see four track lengths, I should say, because the tracks are that wide (indicating) and it was perfect clearance from that road that he made a proper move in that one move, yes, sir, that he could see there wasn't anything coming in that direction from the west.

Q. If a brakeman did that, do you know of any rule of the company that he violated? A. Yes, sir, I believe I do.

Q. Let us have that. A. I believe he violated Rule 124. Special instructions say he must get down and flag it. I don't believe that would leave him in the clear. I am telling you the truth.

Q. What do you mean—Rule 124? A. I think it is Rule 124. Let us see which is the rule.

Q. Do you want to see the rule book? A. Yes, sir. I should have said Rule 103.

Q. Which is Rule 103? A. "When cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on the front of the leading car and when shifting over public crossings at grade not protected by a watchman, a member of the crew must protect the crossing."

Q. What do you mean by "protect the crossing"? A. I think the company is the judge of that and if I do not protect that crossing I am guilty of negligence.

Q. Do you protect the crossing when the brakeman holds onto the lead end of the back-up movement in a position with a light to wave and where he can see any traffic coming from the west with the east side blocked? A. I have already answered that question and told you in this case where there was clear vision from the west and he is blocked, he had properly taken care of that crossing.

Q. Mr. Huband, the evidence shows that on the night in question the road engine held to three hopper cars, came down off the hill and backed up into slow siding in order that the yard engine might push a car back up on the hill to

the Rocky Mount cars left on the hill by the road engine. Was that road engine, in its movement in coming down off the hill and backing into slow siding making a movement in road service? A. It was a road engine making a move in a yard limits to clear the train so that a yard engine could classify his train.

Q. Is the movement made by a road engine for that purpose a movement in road service or is it a movement in yard service? A. It is a movement in road service to avoid paying a yard crew day.

Q. In other words, if that had been a movement in yard service, the road crew would have to be paid, in addition to road rates, a minimum yard day? A. That is right.

Q. But on a movement of that kind that I have just described, the road crew would not get a minimum yard day? A. That is correct.

Q. I believe that you mentioned a little while ago that back up north of Clopton Road on slow siding there is a water tank, isn't there? A. Yes, sir, about forty car lengths from the road crossing.

Q. Have you seen the road engine backing up slow siding to go to that water tank? A. Yes, sir, many times.

Q. Have you seen on other occasions when you were there in Clopton Yard a road engine backing up into slow siding? A. Yes, sir.

Q. In completing the classification of First 209 at Clopton Yard, is it a fact that some nights you make one move and other nights you make other moves and still other nights you make still other moves? A. You are correct, sir, yes, sir.

MR. SATTERFIELD: I think we have a right to as who he means by "you".

BY MR. DENNY:

Q. I will divide it. Some nights does the yard engine make one series of moves and another night another series of moves and other nights other series of moves? A. We make moves according to the classification of trains and the cars we have got to cut in.

Q. And the fact that you bring out different classifications on different nights and a different number of cars necessitates different moves on different nights, does it not? A. Yes, sir.

Q. That is true of the yard engine? A. The yard engine is switching and that is what his job is, to switch.

Q. Is it also true of the road engine that some nights the road engine will make one type of move and another night it will make another type of move? A. Yes, sir, but it is generally right regular in the one move.

Q. Do you mean when you say "generally right regular" that a majority of the time it gets into the clear down to the south? A. It gets down to the south, yes. We generally try to make a straightaway move as much as possible in making all moves.

Q. You have acted as yardmaster out in this yard, I believe? A. Yes, sir.

Q. And there are times when, as conductor, you have directed the moves out there? A. Yes, sir.

Q. Your duty, if you are the person to determine what moves shall be made, is, first of all, to direct safe moves, is it not? A. That is right.

Q. And, secondly, to direct the most expeditious moves possible, is it not? A. Yes, sir, that is right.

Q. You try to make the smallest number of moves in the smallest amount of time? A. Every move is extra time lost, yes, sir.

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P. W. WRIGHT, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. GARY:

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Q. How long have you been with the Atlantic Coast Line? A. February 11, 1937.

Q. In what capacity did you first go with them? A. As fireman.

Q. And were you fireman from that time until March 20, 1940? A. Yes, sir.

Q. Were you the fireman on Mr. Myrick's train the night that Mr. Tiller was struck in Clopton Yard? A. Yes, sir.

Q. Where did you take that train? A. From Acca Yard to South Rocky Mount.

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Q. What time did you arrive at Clopton Yard, do you recall? A. It was around 7 o'clock.

Q. Was it dark? A. Yes, sir.

Q. Were the yards lighted in any way? A. No, sir.

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A. We took these three cars and came down here to clear this switch at slow siding and backed those three cars back across slow siding.

Q. Up into slow siding? A. Yes, sir.

Q. While you were backing up into slow siding were there any other trains on the yard? A. Yes, sir, the yard engine was coming up the southbound main line right here. The yard engine was bringing cars from South Richmond on the southbound main line.

Q. And was that engine proceeding with those cars on the southbound main line while your train was backing up into slow siding? A. Yes, sir, there was a movement of both trains.

Q. In opposite directions? A. Yes, sir.

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Q. What happened after you stopped your train in slow siding? A. After we stopped the train in slow siding I saw a little beam of light down just north of the crossing.

Q. Just north of what crossing? A. Clopton Road crossing and I walked over to the engineer's side and thought probably there was a car sitting over there shining its lights over there and there wasn't a car over there, so I got down off my cab and walked to the crossing to see what it was and I had a flashlight in my overalls pocket and I flashed it on

the flashlight and then I flashed it up the track and saw a man's cap and so I went back when I saw that to the engineer and told him what I had saw and asked him to come with me and we went back up there and he said, "Wright, you have got a flashlight?" I said "Yes," and he said, "Give it to me," and I gave him my flashlight and he went up the track looking and he saw the flashlight and Mr. Tiller's hat, it turned out to be, and his gun and then Mr. Tiller was at the rear car.

Q. On which side of the train were you, Mr. Wright, as it went back into slow siding? A. Well, the fireman's side is the left side of the engine and that is the side I was sitting on.

Q. On the left side of the engine going forward? A. Going forward.

Q. That would be on the right side of the engine going backward? A. Yes, sir, if you want to term it that.

Q. You were on the east side over on the side of the engine next to the southbound main line on which the other cars were shifted? A. Yes, sir.

Q. Did you help get Mr. Tiller from under the car? A. Yes, sir.

Q. Where was he? A. He was hung between the leading set of trucks on the leading car.

Q. Did you have any difficulty in getting him out? A. Yes, sir; his foot was hard to get out from between the frame of the truck and the wheel.

Q. Was he conscious when you got him out of there? A. No, sir.

Q. Did he regain consciousness after you had gotten him out? A. Yes, sir, he regained consciousness in a few minutes, I guess, after we got him out.

Q. Did he make any remark at that time? A. Yes, sir, he asked me who I was. He asked me what hit him.

Q. Any other remark? A. No, sir, not that I remember.

Q. What happened after that? A. Mr. Myrick and I bathed his face and when I went after water I run up and

hollered to somebody and told them that Mr. Tiller was hurt and came on back there and carried water there and washed his face and I stayed with Mr. Tiller while Mr. Myrick notified the Yardmaster and got the train out of the way.

Q. How long were you there?

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A. I wasn't there with him over ten or twelve minutes, I don't believe, before Mr. Jones called me to go to my engine and get my train out of the way.

Q. Did you then get on your train and go south? A. Yes, sir.

Q. Are you familiar with this rule book? A. Yes, sir.

Q. Do you have a copy of it? A. Yes, sir.

Q. Will you read Rule 24 to the jury. A. "When cars are pushed by an engine, except when shifting or making up trains in Yards, a white light must be displayed on the front of the leading car by night"—

Q. On Figure 18 there is a freight car being pushed by an engine by night with a white light on the front of the leading car at "A". Did the lead car of the movement that was being pushed into slow siding by this engine on the night of March 20th, when it struck Mr. Tiller, have a light of that kind on it? A. No, sir, there was not a light on top of it.

Q. Was there any light on it at all? A. The brakeman was on the engineer's side giving him a signal. That was the only light that was on it.

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MR. GARY: I will pass that to the jury and let them see Figure 18 in the rule book.

Q. Mr. Wright, was there any light on the rear of the locomotive that was pushing those cars backward into slow siding? A. Yes, sir.

Q. What kind of a light was it? A. A bulb that sits right on the end of the tank, the top end of the tank.

Q. What size bulb? A. That I couldn't say. I don't know what watt bulb it is.

Q. Does it throw any beams down the track at all? A. No, sir.

Q. Would that bulb that was on the rear of that locomotive enable a person in the cab of the locomotive to see in a clear atmosphere a dark object as tall as a man of average size standing erect at a distance of at least 300 feet ahead and in front of it? A. No, sir.

Q. Mr. Wright, how long had you been working on train 209? A. That is not assigned regular to any of us. We catch it. We work first in and first out and catch it occasionally.

Q. Had you been catching it in your regular turn ever since you were employed by the company? A. Yes, sir. I have been catching it off and on but I had been cut off a lot. I was working extra most of the time. The year prior to this was when I was cut off probably seven months.

Q. How many times would you say that you had handled that particular movement as fireman prior to this accident? A. Since I have been employed?

Q. Yes. A. Twelve or fifteen times.

Q. Will you state what was the usual movement of the train during those times? A. Well, the trains that I have went in there and got, we got in the clear south of Clopton Road. I had got in the clear south of Clopton Road for the other trains when I would pick up in there.

Q. Had you ever, prior to this time, when working on this movement, backed into slow siding? A. No, sir, I hadn't.

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CROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Wright, as the road engine backed up north into slow siding, you were sitting on the east side? A. Yes, sir.

Q. And were you facing north? A. Yes, sir.

Q. You were looking up the area between your cars on slow siding and these cars that had stopped on southbound main line, were you? A. Yes, sir.

Q. Does your cab extend far enough out for you to see three car lengths up that area? A. I don't quite get your question.

Q. When you were sitting there in your fireman's seat looking north, could you see three car lengths up that area between slow siding and southbound main line? Let me show you on the plat. You were backing north on slow siding? A. Yes, sir.

Q. Cars were standing here on southbound main line blocking the Clopton Road? A. Yes, sir.

Q. That left an alleyway between the cars you were pushing and the cars standing on southbound main line. Could you see all the way up that alleyway to the head end of your cars and beyond? A. Yes, sir, if there was a light up there I could have seen it.

Q. In other words, the cars you were pushing didn't block your vision? A. No, sir, didn't block my vision.

Q. Did you see any light up there around Clopton Road or immediately north of it? A. No, sir.

Q. Did you see any beam of a flashlight shining across there? A. No, sir.

Q. You had been at the time of this accident in Clopton Yards, you say, about twelve or fifteen times? A. Yes, sir.

Q. And in that twelve or fifteen times that you had been there the road engine, to which you were assigned, had taken a number of different movements, had it not? A. Yes, sir. Sometimes we would go just south of the crossover to the northbound track and then we would go down to the south end of the yard to get in the clear.

Q. So far as you know, in making up freight trains in Clopton Yard, is there any regular routine followed night after night? A. Not as I know of, no, sir.

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Q. Up there at Clopton Yard does the yard crew, night after night, make the same movements? A. No, sir.

Q. Does the road crew night after night make the same movements? A. No, sir.

Q. As you backed up slow siding was the automatic bell on your engine ringing? A. Yes, sir.

Q. You pulled down off the hill and backed into slow siding. May I ask whether that movement of the road engine was a movement in road service or was it a movement in yard service? A. It was a movement in road service.

Q. It was a movement made in a yard but in road service, was it? A. Yes, sir.

Q. Have you worked both in lighted and unlighted yards, Mr. Wright? A. Yes, sir.

Q. Will you state to the jury, according to and from the experience you have had in working in each kind of yard, which type of yard you find is the more satisfactory in which to do your work and which type of yard do you find to be the safer type to work in? A. Well, the yards that are lit that I have been in would blind you at certain places in the yard you get to and you would have to pull your cap down over your eyes to see.

Q. Can you state to the jury from your experience which type you think is the easier to work in? If you can't, don't hesitate to say so. A. You make the same moves in either yard, the ones that I have been in and with the floodlights up there you would get in the right place at times and the things would shine in your face and blind you and you would have to pull down your cap so you would have some shade in your eyes.

Q. Do you operate at night on hand signals from trainmen? A. Yes, sir.

Q. You have to read the signals as given on your side, do you not? A. That is true.

Q. Do you find that the hand signals given by trainmen are more easily deciphered in a lighted yard or unlighted yard? A. In an unlighted yard you could see them better.

REDIRECT EXAMINATION

By MR. GARY:

Q. Mr. Wright, do you think that if that yard had been lighted that night you could have seen Mr. Tiller any more

easily? A. That I don't know. I couldn't answer it because I don't know where Mr. Tiller was. I don't know how he come up. He may have come from the other side or may have come from our side.

Q. You say you could have seen him if he had been in there with a flashlight? A. Yes, I could have seen the light if the beam was in between those cars.

Q. You could have seen Mr. Tiller if Mr. Tiller had been just beyond that crossing examining those cars? A. If he had been in between them, yes, sir, I could have seen him.

Q. Do you think that you could have seen him more easily if the yard had been lighted or as it was without any lights? A. Well, I couldn't possibly have seen him, as dark as it was without any lights, not unless he had one.

Q. When you pull your cap down, as you say you sometimes have to do in a lighted yard, to keep the glare out, if you should happen to get in the way of one of those beams, you can see pretty well in the yard from the lights that are provided; isn't that true? A. It is true if the lights are focused right as they should be in the yard.

Q. If they are focused right they don't usually get in your eyes, do they? A. Well, like at the Norfolk & Western down there, the yard that I have to go in that is lit. The transfer that we have got, pushing around cars in there, has got a crook in it, go around the bend, and those lights make a shadow over the cars and between the cars they make a shadow.

Q. But for the most part in the greater part of the yard you can see much better than if the yards are dark? A. That is true and in some portions it helps and some portions it does harm.

Q. In response to a question of Mr. Denny you stated that this road engine made various movements in the yard. Were all of those movements of the road engine that you had been on prior to the death of Mr. Tiller south of Clopton Road? A. That is true.

Q. And I believe you stated this was the only time up until that time on which you had been on the train that it

had ever backed north of Clopton Road into slow siding?

A. Yes, sir.

RECROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Wright, had Mr. Tiller been standing between slow siding and the southbound main line or on slow siding flashing a flashlight up against the cars standing on southbound main line, would you have been able to have seen the beam of his light better in a dark yard or in a lighted yard?

A. You would have seen it better in a dark yard.

C. L. PARRISH, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. How long have you been employed by the Atlantic Coast Line? A. Twenty-nine years.

Q. In what capacity? A. Conductor.

Q. All the time conductor? A. No, sir, just twenty-three as conductor.

Q. Six years as what? A. Trainman—brakeman.

Q. During this period of service with the Atlantic Coast Line, will you state to the jury whether or not you have had any experience at Clopton Yard in connection with the making up of Train 209? A. I have.

Q. As trainman? A. As trainman and conductor.

Q. How often would you say, in the twenty-nine years that have passed that you have had connection with the classification and making up of this train in Clopton Yard?

A. Two or three times a month.

Q. Two or three times each month? A. That is an average.

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Q. Is there a usual movement made by the road engine as

it comes over with a string of cars to Clopton Yard while it is waiting for the train to be made up by the switching engine from Byrd Street Station? A. Yes, sir.

Q. What is that usual routine movement? A. Well, when we arrive we call the Yardmaster at South Richmond and he instructs us what to do. As a usual thing he tells us to cut off the engine and whatever cars that are necessary and drop in some track. When I say "drop in", we mean go in some track.

Q. What do you do when you drop into that track with the road engine? A. Stay there until the yard engine classifies the train.

Q. Will you state to the jury, Mr. Parrish, whether in all your twenty-nine years experience, including your experience of, I think you said, two or three times a month— A. That is an average.

Q. —connected with 209, have you ever known that road engine to be ordered back in a movement backward with the engine and some cars on slow siding? A. I never have been in there that I can recall. Of course, I don't keep a check on my trips but, as far as I recall, I haven't been in.

CROSS EXAMINATION

By MR. DENNY:

Q. Mr. Parrish, have you ever taken on water over there at Clopton Yard? A. I have not.

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Q. You are not able to state whether you have or have not been in slow siding? A. That is what I said, yes, sir.

Q. Night after night as you have been in Clopton Yard with 209, has the road engine made the same moves or would it makes moves one night using one track and another night using another track? A. We would go in different tracks. That is right.

Q. Is that true of the yard engine also? Does it one night make one series of movements and another night another

series of movements? A. The yard engine making up the train shifting—I don't pay any particular attention to his movements.

Q. This movement of a road engine going down the hill and backing up into slow siding so as to get in the clear in order to permit the yard engine to make up the train is a road movement or a yard movement that the road engine makes? Is it a movement in road service or a movement in yard service? A. Well, you are in the yard limits.

Q. But is it a movement made in road service or is it a movement made in yard service? A. I would say it is a movement made in road service, backing in there.

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Q. Mr. Parrish, have you worked both in lighted and unlighted yards? A. Yes, sir, that is right. I have never worked in yard service but I have been in both yards.

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Q. According to your experience, do you find it easier to do the work in a lighted yard or in an unlighted yard? A. In a lighted yard.

Q. Why do you say that? A. Because you can see any object that is in your way or coupling to cars. It is much better to work in a lighted yard than it would be an unlighted yard.

Q. You prefer the lighted yard? A. Yes, sir.

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JAMES W. SINTON, JR., a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

Q. Mr. Sinton, will you give your full name and your occupation to the jury, please? A. James W. Sinton, Jr.; I am Vice-President of the Atlantic Life Insurance Company.

Q. Are you an actuary, Mr. Sinton? A. Yes, sir.

Q. How many years experience have you had as an actuary? A. Since July, 1913, with the exception of two years I was in the Army.

Q. What is the life expectancy under the American Experience Table on March 22, 1940, of a man who was born on the 13th day of July, 1888? A. That man would be 51 years and a little over eight months old. The expectancy by the American Experience Table would be $19\frac{3}{4}$ years.

Q. What is the life expectancy under the United States Table for white males on March 22, 1940, for a man who was born on July 13, 1888? A. The expectancy of such a man would be exactly half a year less, $19\frac{1}{4}$ years.

Q. Mr. Sinton, what is the present value at 3 per cent of \$150.00 per month for 19.73 years under the American Experience Table? A. If the first payment is to be made at the end of the month, the value will be \$26,895. I have that figure at the beginning of the month, if you wish it.

Q. At the beginning of the month would be what? A. \$26,962.

Q. What is the present value at 3 per cent of \$150 per month for 19.25 years under the United States life table for white males? A. That value, if the first payment is to be made at the end of the month, is \$26,390 and if the first payment is to be made immediately, it is \$26,455.

Q. If a person received additional compensation in the form of a raise, that is above \$150, or earned more than that sum, would or would not these figures increase? A. They would increase, of course.

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REDIRECT EXAMINATION

By MR. SATTERFIELD:

Q. Are these tables to which you have referred tables used by insurance companies? A. The American Experience Table is used by insurance companies based on insured

lives. The white male table of the United States Life Tables is based on general population statistics and not on insured lives altogether.

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E. B. OREBAUGH, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. Are you an employee of the Atlantic Coast Line Railroad Company? A. Yes, sir.

Q. In what capacity? A. Extra conductor.

Q. How long have you been in the employ of the Coast Line. A. Since October, 1936.

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Q. From the time that you were employed in October, 1936, until March, 1940, will you state to the jury whether or not you were called for service with either First or Second 209? A. Yes, sir.

Q. Were you called for service on both trains? A. Yes, sir.

Q. In yard service as well as road service? A. Yes, sir, just road service.

Q. You had nothing to do with the crew on the yard engine that would bring a part of that train from Byrd Street Station? A. No, sir.

Q. Do I understand you to say that your connection was altogether with the road engine out of Acca? A. Yes, sir.

Q. How many times would you say, from October, 1936, until March 20, 1940, per month you were called for duty with 209? A. I would say anywhere from four to five or six times maybe.

Q. A month? A. Yes, sir, more or less.

Q. During that period, 1936 to 1940, were you then serv-

ing as trainman? A. I was promoted to conductor in 1941.

Q. That was after 1940? A. Yes.

Q. 1936 to 1940 you were in what capacity? A. I was trainman.

Q. Will you state to the jury what was the movement of the road engine when it reached the top of the hill over there near Clopton Yard with a string of cars it was bringing from Acca?

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A. You usually have short hauls to Petersburg and Weldon and, of course, you have to hold your Weldon—it all depends on the classification but you have to get in the clear. My experience every time I have been there—I always drop clear of the crossover on No. 1 track. That would be south of the crossover.

Q. Was that your experience on all of the runs you had on that assignment? A. Yes, sir. I have backed north of the crossover but I couldn't say whether it was on this special train or not.

Q. Do you recall in all of your experience the road engine being pushed back in a back-up movement down on slow siding? A. No, sir, I can't say that I have.

CROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Orebaugh, I understand you to say you have backed north of the crossover? What do you mean by that?

A. To get in the clear. You see they run a transfer from the yard to Acca and sometimes that transfer will be setting in the track there and to keep from blocking him you will drop north of the crossover to let him go over the hill to keep from delaying him.

Q. When you say you drop north of the crossover it means you would back into slow siding, does it? A. Yes.

Q. So you have backed into slow siding? A. Yes, but I

can't say whether it was this train or not but I have been in slow siding.

Q. You don't know whether it was this train or in connection with other trains? A. Yes. I will say a third or a fourth of our trains go through Clopton.

Q. And from time to time you have seen virtually every track in Clopton used, haven't you? A. Oh, yes.

Q. And you have seen them used in forward movements and in backing movements, haven't you? A. Yes, sir.

Q. There is nothing particularly unusual about using any track, is there? A. No, sir, no yard track. You use them any time you want.

Q. Members of train crews know that those yard tracks are likely to be used at any time by a train going forward or backward, don't they? A. Yes.

Q. Have you worked both in lighted and unlighted yards? A. Yes, sir.

Q. From your experience do you find that a lighted yard or an unlighted yard makes your work easier to be done or safer to be done? A. I have worked in several different type lighted yards.

Q. You have worked in Acca? A. Yes, sir.

Q. Which is a right fully lighted yard, I believe? A. Yes, sir.

Q. Do you find that it is easier to do your work and do you think safer to do your work in a yard fully lighted, as is Acca, or in an unlighted yard? A. Well, personally myself I don't like the lights at Acca. They will blind you. I don't like the lights at Acca because the lights are shining down on you, right in your face. You take the yard at Bellwood—I like to work down there in those lights. They come straight down.

Q. Is there a point in the yards at Bellwood that you will get blinded by those lights, the lights being focused in some direction and if you get in the focus of the lights do they blind you? A. I have never noticed it but those lights are mostly coming straight down at Bellwood.

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. If the lights are properly installed by the companies, you prefer a lighted yard or dark yard? A. If I were a yardman I would prefer a lighted yard.

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W. C. MOORE, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. GARY:

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A. Willis C. Moore.

Q. What is your occupation, Mr. Moore? A. Locomotive engineer, Atlantic Coast Line Railroad.

Q. How long have you been employed by the Atlantic Coast Line Railroad? A. Thirty-two years and seven months.

Q. How long have you been an engineer with the company? A. Twenty-six years.

Q. Is it a part of your duty as engineer to carry trains into and through Clopton Yard? A. Yes, sir.

Q. Have you during that time made the run known as 209? A. Yes, sir, in my regular run.

Q. Do the engineers take that run in regular turn? A. Yes, sir, we rotate and, if we catch that train, we do.

Q. Prior to March 20, 1940, how often would you say that you were on the run known as 209? A. It is rather hard to say. I run it every other day for a period of time, for days, and possibly a month without it.

Q. But on the average could you give any estimate at all of how many times a month? A. Three to seven times a month or something like that. I think that would be a fair average.

Q. Did you run the road engine or yard engine? A. I have run both.

Q. Will you state to the jury what is the regular movement of the road engine on 209 from the time it leaves Acca?

A. We get cars that are to go and sometimes only the caboose leaving Acca to go to Meadow through the old line to Clopton and there the conductor calls for instructions from the Yardmaster which we obey.

Q. What are those instructions usually? A. As a general rule it is to detach the engine from the train and what cars may be necessary, according to classification, and to get out of the way of the yard engine for him to do the switching.

Q. How does it usually get out of the way of the yard engine? A. Well, as a general rule go into No. 1 track.

Q. No. 1 track? A. Yes, sir.

Q. Is that north or south of Clopton Road? A. South.

Q. Is it north or south of the crossover from No. 1 to the main line? A. The entrance of it is north.

Q. But where you get out of the clear, do you go north or south of that crossover? A. South.

Q. You go on down into the yard south of that crossover? A. Yes, sir.

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Q. Were you ever on 209 prior to March 20, 1940, when the road engine cut off on the hill and, in order to get into the clear backed up in a reverse movement into slow siding over Clopton Road northward? A. I can't remember making that move on that particular train, no, sir.

CROSS EXAMINATION

By MR. DENNY:

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Q. Let us develop it this way: In getting in the clear there do you, night after night, get into the clear in exactly the same fashion? A. No, sir.

Q. Many nights you don't even have to get into the clear because all you have to do is pick up cars down on the south-bound main line? A. That is true.

Q. You simply go on down through the crossover, get those cars, come back and pick up your caboose and go? A. That is true.

Q. And depending on the classifications in your train and the classifications in the yard train are the movements which the Yardmaster directs, are they not? A. The classifications that you speak of in switching?

Q. And some nights the yard engine has to do one type of switching and other nights another? A. That is true.

Q. And some nights you get into the clear and make one set of movements and other nights you get into the clear in another way and make another set of movements, do you not? A. Yes, sir.

Q. And even if you get into the clear by going into No. 1 track, then you come back out of No. 1 track, generally backing into slow siding, don't you, to go over and pick up your cars, or do you run a half mile down to the end of the yard and then back up all the way? A. I can't just understand your question.

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Q. If you get into the clear by coming down off the hill through your hill switch and on down to No. 1 track, you would be right at the very top of this picture and perhaps a little off the picture? A. Yes.

Q. After the yard engine has made up your train, don't you then back up at times on No. 1 track or slow siding and don't you sometimes go all the way down pretty near half a mile to the end of the yard and back? A. We have done that, yes. At times we have picked a train up in the extreme south end of the yard.

Q. When you come into Clopton Yard, either on the yard engine or the road engine, you follow whatever directions the Yardmaster gives you? A. Yes, he gives the instructions to the conductor. I follow his instructions.

Q. The instructions are relayed on to you either by mouth or hand signal? A. That is right.

Q. But they originate with the Yardmaster? A. Yes, sir.

Q. And from time to time in the make-up of these trains almost every track out there is used, is it not? A. Yes, sir.

Q. And is there anything unusual in a freight yard in making up trains about an engine backing on any track? A. I would say no.

Q. The water tank out at Clopton is up north of Clopton Road on slow siding, isn't it? A. Yes, sir.

Q. Don't engines sometimes back up slow siding to get water, or have you seen that? A. I have seen it but in order to do that you have to get particular permission from the Yardmaster.

Q. You have seen engines, either by themselves or pushing cars, backing on slow siding, haven't you? A. Yes, sir.

Q. And you have seen them backing on virtually every track out there, haven't you? A. Yes, sir, they are there for use.

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Q. From your experience as an engineer in working in the manner in which you have worked in lighted and in unlighted yards, will you tell the jury which you consider is the yard better adapted to your work from the point of view of safety and also of efficiency in doing the work? Which type yard, from your experience, do you like best? A. Personally I like a lighted yard best.

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Q. You, I understand, have frequently taken First 209 from Acca to Rocky Mount? A. A number of times.

Q. Is First 209 regularly required to run backward on any portion of that trip? A. Only in a yard movement.

Q. Take the movement which the evidence shows was made on the night in question. First 209 came in and stopped on the hill by the yard office. A. Yes, sir.

Q. It brought with it three high side coal gondola cars, hopper cars, I believe you call them, destined for Petersburg and some cars destined to South Rocky Mount. It held

to the three Petersburg cars, came down off the hill, went through the hill switch, that hill switch was thrown and it backed up into slow siding so as to get into the clear and permit the yard engine to make the necessary classification. Do you follow the move? A. Yes, sir.

Q. Was the movement of the road engine in coming down off the hill and in backing into slow siding a movement in road service or a movement in yard service? A. I would say in road service.

Q. When Mr. Gary was examining you about the use of slow siding, you said you could not remember whether you had ever backed into slow siding to get into the clear or not. Do you mean by that that you simply don't remember or do you mean to say that you have never backed into slow siding? A. I mean to say on this particular train that I don't remember ever having made that move in there to clear for this particular switching.

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REDIRECT EXAMINATION

BY MR. GARY:

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Q. When this road engine came down off the hill, did it require, to get into slow siding, that the switch be thrown? A. Why, certainly, yes, sir.

Q. Did you consider that a switching movement when it backed up on slow siding? A. No, sir.

Q. You wouldn't call it that? A. No, sir.

Q. Was it switching onto that track from the other? A. It is making a move from one track to the other but what we term "switching" is moving cars from one track to another or classification of cars.

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Q. We had a lot of talk about the crossover from No. 1 to the southbound main line. Will you look at that map and see

whether that is shown on the map or not? A. A small portion of it right here.

Q. But the crossover is really out beyond this picture?

A. Yes.

Q. Mr. Moore, you state that this is not a switching movement. Why do you say that is not a switching movement? A. Because we were not making any switching. We were not doing any switching. We were merely—I say “we”; I was not on this particular train, but in making that move the road crew is simply getting out of the way of the yard engine to do the switching. You may find a more definite definition of the word “switching.”

Q. What are you basing your definition of “switching” on? A. “Switching” is classifying cars, switching one out from between the other, and so on and so forth. In other words, if there were a number of cars there and we got a portion of them and we didn’t get them all and we had to switch them out.

Q. What would be the purpose of this engine cutting off these three cars on the hill? A. Because that would put them in proper classification of the train when it left.

Q. Was that necessary, to hold them, in order to make the classification? A. I presume it was. I don’t know of this particular move.

Q. Then if he cut off three cars on the hill and brought them down for the purpose of making a classification, was he doing the same thing that the yard engine would do if it cut off and carried a few cars down to back into a track? A. Did he leave them there or bring them out with him?

Q. Did he leave them there? A. When he backed into clear, did he leave those cars?

Q. Assume that after some other cars had been put to his train he brought them out and then switched them back to his train. A. I see no difference there whether he had cars or a light engine. He was simply getting out of the way with what was necessary to hold to.

Q. You are basing it on the fact that this was a road engine? A. Yes, sir.

Q. And that you consider shifting the movement by a yard engine? A. Yes, sir.

RECROSS EXAMINATION

BY MR. DENNY:

Q. We are not interested at the moment in the question of whether the engine was yard or road but, in your opinion, does an engine which simply takes with it certain cars, in order to clear the way for another engine to classify the train and then the first engine which had gotten into the clear brings its cars back, engage in shifting work? A. No, sir.

Q. And is not engaged in shifting work whether its primary purpose for being there is road purpose or yard purpose, is it? A. No, sir. It would be impossible for the switch engine to do this switching with the yard engine attached to the train. He has got to get out of the way.

Q. Do you mean the yard engine attached to the train? A. The road engine.

Q. You mean the road engine? A. Yes.

MR. SATTERFIELD: The plaintiff rests.

MR. DENNY: If the Court please, I have been informed by one of plaintiff's witnesses that I asked him on yesterday on cross examination a question which contained an implication that a certain thing was a fact. He says he does not know whether it was a fact and that in his answer he did not call attention to that and he asked me whether he could be given the opportunity to go back on the stand and state clearly what he meant. I told him that I thought it would be proper as part of the plaintiff's evidence for me to recall him to ask that question connected with his testimony of yesterday. He wishes to make a correction.

P. W. WRIGHT was recalled and testified as follows:

BY MR. DENNY:

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Q. I asked you on yesterday whether as you sat there looking north toward Clopton Road as you were backing up, with cars standing on the southbound main line and your cars moving, whether you could see down the alleyway between those cars down beyond Clopton Road? A. Yes, sir.

Q. And you said you could. A. Yes, sir.

Q. Do you recall whether or not the cars on the southbound main line were standing still as implied by my question or whether they were moving? A. I don't know. I don't remember whether they were moving or not.

Q. And you wish the opportunity to return to the stand so as to make it clear to the jury that you did not know whether they were moving or standing still? A. That is true.

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MR. DENNY: If the Court please, we have some motions we desire to make and I think it would be advisable to make them in the absence of the jury.

(The jury retired)

MR. DENNY: We move for a directed verdict upon the following grounds:

First, the plaintiff's evidence shows nothing from which the jury might conclude that the defendant had been guilty of any actionable negligence;

Second, that if perchance there is evidence from which actionable negligence could be concluded, there is no evidence here that would show that negligence to have been the proximate cause of the injuries and death of the deceased;

Third, under the decision of the Supreme Court of the United States in this case, the test is whether the defendant, under the circumstances, acted as a reasonably prudent man, that is a railroad, of necessity would have acted under those circumstances, and there is not a word of evidence

here showing what generally approved railroad practices may be. In other words, as this evidence of the plaintiff stands, the jury out of thin air is to guess at what would be a reasonable proper practice;

Fourth, that this evidence discloses no violation of the Boiler Inspection Act or any of the rules or regulations of the Interstate Commerce Commission promulgated pursuant thereto;

Fifth, even if there had been a violation of the Boiler Inspection Act, there is not a line of evidence from which the jury might conclude that that violation was the proximate cause of the injuries and death.

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THE COURT: The motion is overruled.

MR. DENNY: If the Court please, I wish to reiterate the written motion which we heretofore filed and move that there be stricken from the amended complaint the allegations relating to alleged violation of the Boiler Inspection Act and the rules and regulations promulgated pursuant to the Boiler Inspection Act and I wish to be heard for a few moments on that motion.

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The first ground of my motion is that the Boiler Inspection Act does not apply and that is all I care to say on that.

The second ground of this motion is that even if perchance I should be mistaken, there is no evidence here to show or from which the jury could infer that a failure to have that headlight was the proximate cause of these injuries.

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THE COURT: The motion is overruled.

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W. J. Jones, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

Q. How long have you been in the employ of the Atlantic Coast Line, Mr. Jones? A. Forty-one years.

Q. Will you state what positions you have occupied during that forty-one years. A. Messenger boy, telegraph operator, yard clerk, yard foreman, yardmaster.

Q. How long have you been Yardmaster? A. Off and on for nearly forty years.

Q. Has all of your service been rendered here in Richmond? A. Richmond and vicinity.

Q. For how long a time prior to March 20, 1940, had you continuously been Yardmaster? A. On this particular occasion in that period of time I would guess at five years.

Q. Have your duties repeatedly taken you through the whole series of Richmond yards, Byrd Street, South Richmond, Clopton and Falling Creek? A. Yes, sir.

Q. Are you thoroughly familiar with those yards and the operations of trains in them? A. I think I am.

Q. Were you the Yardmaster at Clopton on the evening of March 20, 1940, when First 209 was made up and when Sergeant J. L. Tiller was fatally injured? A. I was.

Q. And what did you find when you reported was to be your work that day? A. A survey of general conditions indicated that I was to perform the duties of Yardmaster in controlling the operations within that defined territory between Byrd Street and Falling Creek yards.

Q. Did a yard engine subsequently leave Byrd Street yard for Clopton with local freight cars for Second 209 and with cars for First 209? A. Yes, sir.

Q. Mr. Jones, I hand you what purports to be a copy of a switching list dated March 20, 1940, relating to Train First 209 and I will ask whether this is the consist that shows the cars for First 209 that were carried from Byrd Street to Clopton Yard on the night in question? A. This

is a copy of the switch list, the train list or consist, all meaning the same thing, in my opinion. That is a copy of the list of the train on that date.

Q. Of First 209 cars that went out from Byrd Street? A. Yes, sir.

Q. Does that show all the cars that were carried by that train? Does that show the Second 209 cars that were carried? A. This top list does not.

Q. Does the second list show it? A. The second list does show the cars that were carried for Second 209.

Q. How about the third? A. The third list is a list of cars that were carried for Third 209.

Q. In other words, that night you were having three 209s? A. To my best recollection, there were cars for three trains.

Q. How many local cars for Second and Third 209 did the yard engine take out with it? A. I would have to count them.

Q. Count them, please. A. Fifteen cars other than 209.

Q. Other than the First 209? A. Other than First 209.

Q. In what position in the cut of cars from Byrd Street were those local cars when they were carried out to Clifton? Were they at the front of the train, south end of it or rear of it or in the middle—the locals cars? A. They were on the south end of the train next to the engine that pulled the train.

Q. Will you take this consist, the first sheet, that shows the cars for First 209, and tell the jury the destination of the first car north of these local cars. A. The first car north of the local cars was a tank car destined to Waverly, Virginia.

Q. You take that car to Petersburg and shift it to the Norfolk & Western? A. Yes, sir.

Q. So that Waverly would fall into your Petersburg classification, would it not? A. It would.

Q. Then what was the second car? A. The second car on the list is a car destined to Jacksonville, Florida.

Q. And that would fall into the South Rocky Mount classi-

fication, would it not? A. I should, yes, sir. It would probably be put into South Rocky Mount classification.

Q. And then there are six cars consigned either to Petersburg or to points which could be reached only by switch-off at Petersburg? A. Yes, sir.

Q. Then there are thirty cars for South Rocky Mount and beyond; is that correct? A. That is correct, sir.

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Q. I note on this consist of the cars for First 209 that the second line, the car for Jacksonville, which was amid the Petersburg cars, is stricken out and added at the bottom of the page. I believe your testimony is, however, that when these cars came into Clopton Yard that particular Jacksonville car was in between these Petersburg cars? A. That is true.

Q. And on the consist it was stricken out and written in at the bottom? A. That is true.

MR. DENNY: I offer this to be identified as an exhibit.

(This paper is filed and marked Defendant's Exhibit A.)

Q. Mr. Jones, do you know what cars were brought in by the road engine from Acca for First 209 on the night in question? A. There were three cars for Petersburg and the twelve cars for Rocky Mount and beyond.

Q. Did you obtain the consist which has been filed in evidence at the South Richmond yards that night at or about the time the yard engine went over to Clopton? A. I received that list with bills at Richmond, Byrd Street yard.

Q. About what time did you receive that? A. To the best of my recollection, it was at or about 7 o'clock. It might have been a few minutes before or two or three minutes after.

Q. After you received that what did you then do? A. I carried the list with the bills to Clopton and delivered them to the train conductor.

Q. Prior to the time that you arrived at Clopton did you know what cars the road engine would bring from Acca? A. No, sir.

Q. When you arrived at Clopton had the road engine arrived? A. Yes, sir.

Q. Did you ascertain what cars the road engine had? A. Yes, sir.

Q. From whom did you ascertain that? A. The head brakeman on 209 out of Acca. His name was Dickens.

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Q. Had the yard engine reached Clopton when you arrived there? A. No, sir.

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Q. Did you state how you got to Clopton that night? A. I did not but I drove in an automobile to Clopton.

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Q. Where was the road engine when you got to Clopton? A. The road engine was standing on the old northward main line, the branch line, at the road crossing. The front of the engine was about at the road crossing.

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Q. Was it in the position which you gentlemen are accustomed to refer to as being on the hill? A. That is right, yes, sir.

Q. What was the first thing you did after you parked your car and got there? A. Carried the bills to the crossing, to the head end of the train, and I met Brakeman Dickens at the crossing and asked him what he had in his train, meaning "What cars have you and where do they go?" While we were engaged in conversation the conductor of the train from Acca arrived and I delivered him the bills.

Q. Who was that conductor? A. Conductor Wilbourne.

Q. Is he now alive? A. He has since died.

Q. You gave to Mr. Wilbourne the bills? A. I gave him the bills and ascertained from Dickens what his train consisted of.

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Q. After delivering the bills to Mr. Wilbourne and after

he left you, what did you then do? A. I told Brakeman Dickens to hold onto his three Petersburg cars and place the engine and the cars in the slow siding, informing him that I had put a south car in his train.

Q. What do you mean by "put a south car in his train"?

A. Well, I mean that in this case I had a car in 209 from Byrd Street that was to go in the south classification.

Q. Do you refer to that Jacksonville car, which was due to go to the Rocky Mount Classification rather than in the Petersburg classification? A. Yes, sir.

Q. You said you told Mr. Dickens to go into slow siding? A. Yes, sir.

Q. In complying with those instructions what was the proper move for him to make? A. The proper move for Mr. Dickens to make would be to walk down ahead of the engine and put himself in position to throw the switch, to let his train off of the hill track.

Q. Do you mean the first switch on slow siding south of Clopton Road? A. That is the first switch controlling that track.

Q. Will you look at the plat where the old James River line hits slow siding and do you find the switch stand there? A. Yes, sir.

Q. Do you know how far south of slow siding that switch stand is—how far south of Clopton Road, not how far south of slow siding? A. I could not definitely state the number of feet that switch is south of Clopton Road but I think perhaps the switch itself from Clopton Road is close to 200 feet. That is just a guess.

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Q. How many freight cars of ordinary length can you put on slow siding south of Clopton Road without fouling this track going up on the hill? A. One freight car can get in this track, slow siding, and stand clear of the main line.

Q. When you say "main line", you mean the James River line? A. The James River line. It might hold a car and a

third. It wouldn't hold two cars, in my opinion, in there and not foul the James River line.

Q. And what is the length of the ordinary freight car, approximately? A. The average freight car is approximately—the interior of the car is approximately 40 foot 6 inches or 40 feet.

Q. From end of coupler to end of coupler? A. That would run close to 44 feet.

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Q. Do you know whether the cars from Byrd Street had come into the yard at the time the road engine was backing up slow siding? A. They were coming then. The movement of the two trains was simultaneously.

Q. When the yard engine came where were you standing in that yard? A. Near the switch just referred to where Dickens pulled off the hill and backed down into slow siding.

Q. Did you give any instructions to the yard men? A. I informed the yard men that I wanted them to cut this Jacksonville car out of its position that it then occupied and place it on the hill to the cars that had been brought from Acca.

Q. To what yard man did you give that instruction? A. Yard switchman Wamaack.

Q. Where were you and he when you gave that instruction, do you recall? A. Near the position just stated near that switch. I was down a little bit beyond there at the clear, just about clear of this hill track. I had walked forward. This yard engine came down the main line, south on the main line and I had walked diagonally toward that train.

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Q. How far south of Clopton Road was it, approximately, that Mr. Wamaack had to make that cut—how many car lengths? A. I would say three or four car lengths.

Q. Do you recall whether the train from Acca had stopped in order that that cut might be made or whether the cut had been made before Mr. Myrick backed up? A. At the time the cut was made I don't know definitely. I can't say. I am

inclined to believe that Mr. Myrick was moving backward. I know he was moving backward at the time the train arrived from Byrd Street but where Myrick was at the identical moment that Wamack cut that car loose, I am not clear.

Q. In other words, you can't give us any definite testimony on that matter? A. No, sir.

Q. You had instructed the road engine to back the three coal hoppers into slow siding? A. Yes, sir.

Q. And you had instructed that a cut be made immediately behind the Jacksonville car from Byrd Street? A. Yes, sir.

Q. And that the yard engine carry the Jacksonville car and the cars ahead of it down south, then back up onto the old James River division and put the Jacksonville car to the twelve South Rocky Mount cars up on the hill which had been brought from Acca? A. That is the move that had to be made in order to put the Jacksonville car on the hill.

Q. After the yard engine put the Jacksonville car on the hill, what was the next thing the yard engine was to do? A. The yard engine backed down on the southward track, shoved forward again and coupled onto the cars that he had just left on the southward track and left this other Petersburg car.

Q. In other words, he brought the one Petersburg car which was south of the Jacksonville car back to the southbound main line and put it to the other Petersburg cars? A. Yes.

Q. That gave you then on southbound main line, beginning at the south, the yard engine and these fifteen local cars for Second and Third 209, seven Petersburg cars and thirty Rocky Mount cars? A. That is right.

Q. Then what was the yard engine to do? A. Cut behind his cars for Second and Third 209 and go to the south end of the yard and dispose of them there.

Q. In the meanwhile, after the yard engine had put the Jacksonville car up on the hill and had backed down off the hill—right at this point, why do you say “backed”? A. Because the shifting engine was headed north and to get in

that position he had to back. When an engine moves backward it is going—

Q. The yard engine had to back down off the hill and put this one Petersburg car back to the Petersburg cars on southbound main line. What was the road engine to do? A. That completed the train so far as the yard engine's work was concerned. The road engine was to come forward down slow siding, cross through a crossover onto the southward track, back up the southward track and couple onto the cars that had been left there by the yard engine.

Q. Couple his three Petersburg cars right to those seven Petersburg cars from Byrd Street? A. Yes, sir.

Q. Then what was the road engine to do? A. Pull his train down the southward track beyond this crossover so that he could back in and couple to the cars that he had brought from Acca and left standing on the hill track.

Q. That having been done, his train was complete and he was ready to go south, was he not? A. Yes.

Q. When you go to a yard to take charge of the make-up of a train in the classification of cars, what is your first duty in determining the movements you will order? A. I consider the requirements of the duty and the safe handling of the cars to get the train made up with as much dispatch as we can do with safety.

Q. In other words, if I understand your answer, is it expedition with safety? A. Yes, sir.

Q. Do you find that night after night at Clopton and at other places you have to order a different set of moves than those ordered the preceding night? A. Conditions are not at all the same. There is a variation. Quite often we won't make the same move but perhaps once in two or three nights and then again we might make the same move tomorrow night that we made tonight.

Q. Why did you order the road engine on this night in question to get into the clear by backing into slow siding?

A. By doing that he would be in a position to quickly move out of slow siding to the main line and couple onto his train.

Q. Virtually to follow the road engine? A. Follow the yard engine.

Q. You could have ordered him into No. 1 track that night because he ran into it before backing up. A. Yes, he had to go down in that track. The extension of slow siding is No. 1. He had to go down in No. 1 in order to get back into slow siding.

Q. What did you consider to be the advantage in putting the road engine back into slow siding over the situation you would have had if you had directed him to wait down in No. 1? A. If he had waited in No. 1 there would have been a loss of some two or three minutes in his waiting until the yard engine had finished its work on the main line and gotten out of the way. He would have had to back up and pull through the main line, a difference of two or three minutes, perhaps. In the position in which he was, however, he followed—as the yard engine left the main line going south, this road engine came right quickly behind him out through the crossover and backed into his train. It is just a question of saving a few minutes' time in getting the train out.

Q. Of course the road engine, in following quickly behind the yard engine, had to wait until the yard engine had put the one Petersburg car back on southbound main line and then moved on? A. It moved up in position to clear and as soon as the track was clear he came out.

Q. If you had directed the road engine when you got there to pull ahead and remain in No. 1 track until the yard engine had made up the train, would the road engine still have been required to back before it could go over on the southbound main line and get its train? A. The switch is behind the engine and in order to get back on the main line or out on the main line he would have to back up over that switch, pull ahead through the crossover and back up again to couple up his train.

Q. Am I correct that it would also have been possible to send the road engine approximately a half mile down the yard on No. 1 track to a ladder track from which he could

have gotten over to the southbound main line and then have backed up the southbound main line to his train? A. At a considerable loss of time it would have been possible to have done so.

Q. How is that? A. It was possible to have done so but at a considerable loss of time.

Q. In other words, he would have had to wait at the end of the yard until the yard engine had not only made up the train but until the yard engine had gotten all the way down to the end of the yard and then the road engine could have started its back-up movement. A. It would have had to pull out No. 1 to the main line and backed up the main line that distance. It would have approximately meant the movement of the road engine of nearly a mile in order to get the train if he had used that method.

Q. From your experience, how much time would you have lost if you had sent the road engine all the way down to the end of the yard to wait until the yard engine had completed its work and gotten down there and then for the road engine to back back up? How much time would you have lost? A. With that one move I would say close to twenty minutes. It might have been a few minutes more—between twenty and twenty-five minutes, I would say.

Q. Have you frequently been in Clopton Yard, either as foreman or as Yardmaster, at the time of the make-up of this First 209? A. Yes, sir.

Q. Have you frequently been there and supervised the make-up? A. Many times, yes, sir.

Q. Have you ever seen the road engine make the same movement that it made on this occasion? A. Time and again, sir.

Q. Had you ever prior to March 20, 1940, as Yardmaster, directed that move? A. Yes, sir.

Q. Did you know any fact, gleaned from your long experience there, that cautioned you to believe any movement by which the road engine could have been gotten out of the way on that night might be a safer move than the one that

you took? A. I don't know of any safer move I could have made.

Q. There is some hazard connected with every move in a yard, isn't there? A. Absolutely.

Q. Did you see Mr. Tiller on the night in question, prior to the time he was injured? A. No, sir, I did not.

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Q. Did you make any physical investigation there that evening to ascertain whether any wheel had rolled over Mr. Tiller or not, or did you see any fact there which would indicate either that a wheel had run over him or that a wheel had not run over him? A. Indications were that a wheel had run over his leg.

Q. Will you state to the jury how you got Mr. Tiller out? By what means did you get Mr. Tiller back out of the yard?

A. Mr. Tiller was taken on the stretcher and placed in an empty car and taken to Hull Street where he was met by a City ambulance.

Q. Did the yard engine take him on back in the empty car? A. Yes.

Q. Was it a box car? A. Empty box car.

Q. Do you know from what point in the yard that empty box car was gotten? A. It was gotten from the north end of Track No. 2 at Clopton Yards.

Q. That is the track immediately west of slow siding and No. 1? A. Parallel to slow siding, yes.

Q. Could you on the night in question have ordered the road engine to get into the clear by the use of Track No. 2 or did this box car which was there block it? A. No. 2 track was full of cars and no room in that track.

Q. Is there anything unusual in classification having to be made in Clopton Yards in connection with 209? A. The completion of the classification of that train is made at Clopton.

Q. Am I to understand from that that it is begun at Byrd Street and completed at Clopton? A. Yes, sir.

Q. Is there anything unusual about a South Rocky Mount car coming out from Byrd Street in between Petersburg cars? A. That does sometimes occur.

Q. And you order each night these respective movements as you may, first of all, feel are safe movements and then those which are the most expeditious? A. Yes.

Q. Is it a fact that at times if you lose two or three or four or five minutes in a freight yard by unnecessary classification movements, you will perhaps delay that freight as much as half an hour or forty-five minutes to an hour in reaching its destination? A. Yes, sir.

Q. Why is that? A. Well, we have to respect the schedule of passenger trains and the movement of freight trains and, for instance, in this particular case 209 left Clopton and went on to the main line at Falling Creek Yard. We then at that time had a passenger train leaving Broad Street, I think, in the neighborhood of 7:35 or 7:45. The running time that the dispatcher allows a freight train of this class to precede this fast passenger train is twenty-five minutes to clear him at Petersburg. If it takes twenty-five minutes for him to do it and this 209 arrived at Falling Creek three or five or four or six minutes off of that twenty-five minutes, he cannot precede that passenger train. If the passenger train for some unforeseen reason is being delayed leaving Broad Street depot, this freight train is delayed in consequence a further length of time. So the loss of three or four minutes off the schedule might result in considerable loss of time in the aggregate.

Q. Mr. Jones, do you know whether hopper cars of the type that First 209 backed into slow siding on this occasion have sides that are so high that if a headlight was on the tender of a locomotive as a rear light, it would clear the top of those hopper cars or would it shine simply against the end of them? A. If the hopper car was empty the light might shine above it.

Q. Have you ever measured to ascertain whether it would or not? A. No, sir.

CROSS EXAMINATION

BY MR. SATTERFIELD:

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Q. Don't you know from your forty years of experience that when a yard engine moves down between an alley of freight cars that the light from its rear headlight is diffused on each side and is reflected on the side of the freight cars? A. That is true.

Q. Is that true in this instance? A. Yes, true in every instance, so far as I know.

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Q. Is it not a fact that it was because you wished to expedite this movement and the further fact that there had been an error of classification made of a Florida car, when those cars were lined up at Byrd Street Station that day, that those two facts called for the maneuvers and the moves that were made both by the yard engine and the road engine that night in Clopton Yard?

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A. Any switching in Clopton Yard, reclassification of the train, necessitates the movement of the road engine out of the way so that this train can be made up.

Q. I didn't ask you that question. A. That was the move we made.

Q. Will you answer the question I asked?

(The question was read)

A. There was nothing about this movement, Mr. Satterfield, to indicate carelessness or extraordinary speed to get this train out any more than we do every night.

Q. I haven't asked you that question. Will you permit me to ask it to you again? A. Go ahead.

Q. I am asking you isn't it a fact that because you, in conformity with your usual practice in trying to speed up and to expedite the handling of traffic in the yard as Yardmaster, plus the additional fact that that day over at Byrd

Street Station somebody had made an error in putting a Florida car in the wrong place in the string of cars that was to come over to Clopton Yard that night, that those two facts were responsible for and called for the moves that you ordered the yard engine to make and the road engine to make in making up 209? A. If it had not been necessary to put this Jacksonville car on this train out of Clopton, that one move would have been dispensed with, would not have been made, but as it is generally understood here and has been repeated over and over, the classification of this train is completed at Clopton Yard and we do it every night at Clopton Yard one way or another. The train isn't complete until it is classified at that point and I don't know of anything particular on this occasion that required extraordinary speed to get the train going any more than we do ordinarily. The speed of the men in this movement was about the same as we always take in making up a train at Clopton.

Q. So I take it you tell the jury that it was the usual speed with which you operate and plus the fact there was a car in wrong classification that occasioned the moves that were made by the two engines that evening in the yard in making up 209; is that correct? A. The movement by putting this car in classification on this train from Acca. That is what you want to know?

Q. No, you had to put it in the train in its proper place from Acca to correct the mistake that had been made over at the Coast Line Byrd Street Station, didn't you? A. Yes. If that car had come out of Byrd Street Station in the south classification we would not have had to make the move at Clopton of that car.

Q. Is it not a fact that it is the business of the yard engine and its crew to make up First 209 in Clopton Yard every night? A. Yes, sir.

Q. To put that Florida car that was incorrectly placed at Byrd Street Station in its proper place, some agency had to make a change in the arrangement of the cars that came

from Acca; isn't that true? A. That arrangement was made by holding on—

Q. Just answer my question and I will permit you to make any answer you wish. Is that right? A. Yes.

Q. What do you want to say? A. I have nothing further to say.

Q. Either the road engine had to move the three Petersburg cars so that the Florida car could be put up on the hill in the proper place or the yard engine had to move them; is that correct? A. That is correct.

Q. So you decided to order the road engine to do it? A. I decided to order the road engine to hold onto the three cars, to avoid further delay that would have accrued had the yard engine made the move with the three coal cars.

Q. Whether you term it "holding onto" or "pushing it" or "carrying it in", you ordered the road engine to take those three Petersburg cars off of that hill down across the hill switch, up into No. 1 track, didn't you? A. Yes, sir.

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Q. When it went down in No. 1 track it had to go all the way down over the crossover, didn't it? A. It had to go down over the switch.

Q. You backed the road engine—no, it carried them down there in a head-on movement, didn't it? A. Yes, sir.

Q. It went down the hill, over the hill switch and down to what they call pass track 1 which is immediately adjacent to the southbound main line; is that right? A. That is right.

Q. When it got down there how far past the crossover did it go? A. The cars?

Q. The three cars and the engine—past the switch? A. Just far enough for the brakeman to throw the switch that it might back up in slow siding.

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Q. Will you show me the hill switch. Show the jury the hill switch. A. The hill switch is the first switch connecting

the hill track with the track you are just discussing, slow siding, on No. 1 track.

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Q. This is the crossover? A. This is the crossover from the southward main line.

Q. It is the only crossover there. A. He did not pass that.

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Q. I want you to tell the jury how far is it from that crossover to the hill switch? Here is the beginning of it right here. That is the hill switch. A. Just a guess but I imagine it is about three car lengths.

Q. How far did you tell the jury on direct testimony a moment ago it was from this hill switch down to this stretch of track on the south side of Clopton Road? A. I told the jury that I did not know definitely but I thought it was about 300 feet.

Q. Didn't you tell them that only a car and a third could be put in there and be in the clear for a movement down this track? A. I did. I told them it would hold about one box car and a third of a box car to clear this crossing and to clear this hill track.

Q. I want you to tell the jury, do you make as a statement of fact, under the experience you have had in that yard as a Yardmaster, that the distance from that crossover to this switch would accommodate an engine and tender and three cars? A. I don't think so.

Q. Do you still say to the jury that is where he stopped, between this crossover and that switch? A. No.

Q. Where did he go? A. He stopped the rear car just as it came off the hill track in order that the brakeman might throw that switch so that he could back his train.

Q. The engine was beyond the crossover? A. The engine—perhaps it might have been even with the crossover in order to get the rear car over this switch so it could be

thrown. It is possible that the engine might have been in the neighborhood of that crossover.

Q. Mr. Jones, you told the jury a moment ago that No. 1 track was open, didn't you? A. Yes, sir.

Q. Why didn't you order him down in No. 1 track if there was a place he could be in the clear there with these three cars instead of sending him with a back-up movement down in slow siding? A. I told the jury I put him in the back-up movement so he might be in a position, when the yard engine had placed the car on the hill, to move immediately forward and when the main line crossover was clear to come right out behind the yard engine.

Q. And I understood you to tell the jury that the purpose of that order was, as you said, to save two or three minutes? A. Perhaps two or three minutes.

Q. Isn't that where it has usually been sent—the road engine—south of the crossover? A. Sometimes we will drop an engine in there if we have got cars up in here. It depends upon circumstances.

Q. But there was plenty of room up there for him on that occasion, on No. 1 track? A. Yes, there was. There was room enough in there to hold the engine and the three cars.

Q. The yard engine took a cut of cars after it had brought that string—how many cars did it bring from Byrd Street Station? A. About forty-five.

Q. He took a cut of cars south of Clopton Road and moved on down the yard with them? A. After he had completed the train, yes, sir.

Q. When he first got there, when finally he stopped, they took some cars away from the front of the train, I believe you told the jury (I don't remember the number) and moved off southward down the southbound rail? A. Yes.

Q. The road engine took a cut of cars, only it took them off of the top of the hill. A. The road engine took three cars off the top of the hill.

Q. I ask you as the yardmaster in charge were not these movements, one made by the road engine and the other by

the yard engine, a part of the moves necessary to make up First 209? A. The movement of the two trains was necessary to complete the movement.

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Q. Was the movement made by the road engine coming down off the hill to get the road engine out of the way? A. Yes.

Q. That was your principal concern as Yardmaster night after night, to get the road engine out of the way so the yard engine could perform its duties, wasn't it? A. Yes, sir.

Q. Will you tell these gentlemen, if that was the case, why did you have him carry three cars with him that night? A. The reason I had him to carry three cars that night was because these three cars were for Petersburg and when the train was completed and he was to pick up, his Petersburgs would be coupled to the seven Petersburgs to put them all in one bunch or classification so that when they were set off at Petersburg no switching would have to be done. All of the Petersburg cars would be together. That is what we call classifying a train.

Q. So that that maneuver or move, I believe it is called, was essential in making up 209 that night? A. Yes, sir.

Q. I believe you told the jury a moment ago that you told Dickens to take those three cars out of there because you were going to follow that with the next move of having the yard engine put the Florida car in the right place? A. Yes, sir.

Q. When you were talking to Dickens he was, as you told the jury, standing down on the Clopton Road in front of the road engine before it came down off the hill; is that correct? A. That is right, yes, sir.

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Q. To get back on this slow siding and conform with your order, it had to go up to the hill switch and come back? A. Yes, sir.

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Q. Where were you standing?

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A. South of the road crossing.

Q. Were you there when Mr. Myrick pulled down? A. No, sir; when I told Dickens what to do, I moved.

Q. Where did you go? A. I walked on down over the crossover but stopped right in here.

Q. Didn't you state to the jury a moment ago that Mr. Dickens walked down to the switch preparatory to throwing it so he could come back? A. He passed me but I don't know how far he went.

Q. So he walked across this road with his lantern, didn't he? A. No, he was on this other side, south side of the road, when I told him what to do. Dickens was standing here when I approached Dickens and told him what to do, south of the road crossing, just south of the road crossing.

Q. Didn't you state to the jury on Direct Examination that you went up to the engine that was standing there and had not yet entered the road or crossed it and that Mr. Dickens was standing there beside the engine? A. No, I didn't say that.

Q. I will ask you did Mr. Dickens have his lantern in his hand? A. Yes, sir, he had something in his hand. I took it to be his lantern.

Q. You took it to be a lantern? A. Yes.

Q. What did it look like? A. I didn't pay any attention to it. I was talking to him and the conductor came up at the same time and I handed him the bills.

Q. It was dark, wasn't it? A. It was dark.

Q. Could you miss seeing a lantern? A. If I had been looking that way, I was looking at the conductor. I presume he had his lantern.

Q. He had gotten across the road and he was on foot? A. He was already across the road.

Q. And on foot? A. Yes.

Q. And he passed you as you went on down toward that

general direction southward? He passed you on the way to the hill switch? A. Yes.

Q. Do you know whether anyone told Sergeant Tiller that night that that move would be made? A. I don't know, sir. I never saw him myself and I didn't hear anyone else say that they had seen him.

Q. You didn't tell anyone to look out for him, did you? A. No, sir.

Q. You knew Sergeant Tiller? A. Quite well.

Q. You have seen him many nights there inspecting the car seals as the train would be moving southward, had you not? A. All over the yard.

Q. You had seen him on some occasions standing there between the tracks and on the slow siding with his flashlight, checking the car seals as the train moved down? A. I don't recall ever having seen him on slow siding but I have seen him all over on both sides of the yard.

Q. What places did you see him? A. I have seen him south of the crossover switch that you were discussing.

Q. Between the rails, with his flashlight? A. Between the tracks.

Q. With his flashlight? A. Yes. I have seen him at the south end of the yard.

Q. With his flashlight? A. With his flashlight. I had seen him at Byrd Street with his flashlight and I had seen him come down from Acca on the train with his flashlight.

Q. You have seen him sometimes north of Clopton Road, haven't you? A. Many times.

Q. There were only two engines in that yard that night? A. Only two engines, to the best of my recollection.

Q. It is a fact that between half past six and half past seven, or whatever the usual hour is that 209 is being made up, there are just the two engines in the yard there at that time? A. Generally there are just two engines, yes.

Q. There were no other cars moving in the yard at that time except those incident to 209? A. Well, sometimes—

Q. I mean that night. A. No, not that night.

BY MR. DENNY:

Q. Mr. Jones, did the road engine on that night do any classifying work? A. No, sir.

BY MR. SATTERFIELD:

Q. Your company has a set of rules for the employees of the company which govern and dispose of the question as to whether or not, when they are ordered to do certain things, it is yard service or road service; isn't that true? A. Yes, sir.

Q. As a matter of fact, under those rules if, as Yard-master, you are injudicious enough to order a road engine to do a little too much, that employee will get road time, if he is going on down to Rocky Mount, plus a whole day for switching? A. Yes, sir.

Q. What is the demarcation that decides the question of how much they are to earn under circumstances of that sort, as to whether it is road or yard service? A. Well, if this road engine had made this move, switched this Jacksonville car onto the train, had performed the duties that the yard engine had performed, then he would have, according to the rules, been entitled to additional pay.

Q. In other words, if they had, besides backing up the three cars—the road engine—had left those three cars there in slow siding and had slipped on up the hill and helped the yard engine in making up the train by putting the Florida car in the right place, they would have gone over the line, so to speak, and would have been entitled to yard service? A. Yes.

REDIRECT EXAMINATION

BY MR. DENNY:

Q. Mr. Jones, in making your moves out there, if the road engine comes in with short hauls for Petersburg and Weldon and also south cars destined for Rocky Mount, doesn't the road engine always have to hold onto its short hauls? A. It

depends entirely, sir, on how the cars are standing. If we are running Petersburgs on the head of the train and we have got Petersburgs in the other cut, the logical thing to do is for him to hold onto those three cars in order to get them all together and avoid any switching.

Q. And for a long time you had been classifying that train Weldon, Petersburg and Rocky Mount, had you not? A. Yes, sir.

BURTON A. ANGLE, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. TOWNSEND:

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Q. What position do you occupy, Mr. Angle? A. Sergeant of Police, Coast Line Railroad.

Q. Did you occupy that position in March of 1940? A. Yes, sir.

Q. You were not present at the time Mr. Tiller was hurt, were you? A. No, sir.

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A. We taken Mr. Tiller out and put him in the ambulance and I got in with one doctor and Mr. Tiller and went to the Memorial Hospital and there we were unable to get a room for him so we put him back in the same ambulance and carried him to Grace Hospital.

Q. Did they take him in at Grace Hospital? A. Yes, they took him in at Grace Hospital.

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Q. Mr. Angle, how was Mr. Tiller dressed on the occasion? A. Mr. Tiller had on an unusual lot of clothes. He was dressed for heavy wintertime, being out all night. As near as I can remember, he had on a sweater, heavy underwear, a leather vest and a top leather coat.

Q. Have you ever ridden train First 209 from Acca to South Rocky Mount? A. Yes, sir.

Q. Have you ever ridden it with Mr. Tiller? A. Yes, sir.

Q. Are any instructions given the special officers of moves that are to be made in the yard? A. No, sir, none at all.

Q. Where do they ride on the train? A. Well, I would say we ride all the way from the engine and sometimes we ride on top of the cars, inside the cars; sometimes we ride the cab.

Q. Are instructions given you as to whether you must look out for yourself in the yard? A. We have always been instructed to look out for ourselves doing general police work outside of the train.

Q. Have you ever ridden First 209 with Sergeant Tiller? A. Yes, sir.

Q. Have you ever been assigned to First 209 when the engine went into slow siding? A. I have at times seen engines go through slow siding. I couldn't say what time it was or what time of year it was or what year it was in.

Q. Would it be an unusual thing if it did back into slow siding? A. I don't think so.

CROSS EXAMINATION

By MR. GARY:

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Q. How many times have you seen the road engine to 209 come down off of the hill onto track No. 1 and back up into slow siding? A. No special move. I never taken notice to any special move being made.

Q. Do you recall ever having seen it make that move in the make-up of 209? A. Well, yes, I have.

Q. How many times? A. I wouldn't say.

Q. Wouldn't you say it was very infrequent? A. Well, I never rode 209 regular, you see.

Q. But usually it goes down into track No. 1 down below the crossover, doesn't it—the road engine? A. The road

engine generally pulls down to the south end of the yard.

Q. Over the crossover? A. Yes.

Q. And it is very infrequent that it backs up into slow siding; isn't that true? A. I haven't seen it go in there so many times but I have seen it used. I am not out there every night.

Q. Were you Sergeant of Police when Mr. Tiller was killed? A. Yes, sir.

Q. And you are still Sergeant of Police? A. Yes, sir.

Q. Have you had a general raise in salary since Mr. Tiller was killed? A. Yes, sir.

MR. DENNY: May it please the Court, I object to that question. It has nothing whatever to do with this case. We are concerned with matters in March, 1940.

THE COURT: I think the objection is good.

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WILLIAM FERGUSON, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. How long have you been on the Atlantic Coast Line police force? A. Something over sixteen years, about sixteen and one half.

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Q. Did you ever, as a sergeant of the railroad, ride First 209 from Richmond to South Rocky Mount regularly? A. Yes, sir.

Q. About when was that that you rode it regularly? A. Five years since I rode it regularly.

Q. Was that before Sergeant J. L. Tiller began to take on that as a regular run? A. He and I rode it together, that is about every other night.

Q. You alternated; you would take it one night and Mr. Tiller the next? A. Right much of the time, yes, sir.

Q. When you were riding that train where did you generally meet it? A. Part of the time at Clopton Yard—not much of the time. The bigger part of the time I would ride the cars away from Byrd Street Yard.

Q. Would you sometimes ride them from Acca? A. Yes, sir, more especially on Sundays.

Q. Did you have any instructions governing the point that you should occupy on the train when you were riding it? A. No, sir. We used our own judgment and ride about where we want to.

Q. Where do you ride on the trains? A. The majority of the time on the caboose.

Q. Where else do you ride? A. I have rode in an empty car and I have rode on the engine.

Q. Do you gentleman also, in between connecting yards and for short distances, ride the top of the cars? A. I have done that at times, yes, sir.

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Q. What tracks in Clopton Yards are used in the make-up of First 209, or do you know? A. I know some of them that was used at the time I was riding was used pretty often, if not regularly.

Q. What tracks were those? A. Well, the yard engine brings cars out from Byrd Street Yard and he would be on one or the other of the main lines. We have a northbound and southbound. Most of the time it would be on the regular southbound track out to Clopton Yard and the road crew that came out of Acca to pick up these cars at Clopton would come in over what they call the old Belt Line and the engine would stop just about opposite Clopton Yard office. As a general rule, the engine would cut off and pull down and get in a track out of the way if she had some switching to do on the train of cars that were brought on that train or the cars that were brought out from Byrd Street.

Q. Have you seen the road engine get into the clear by going down into No. 1 track? A. Yes, sir, No. 1 and the

southbound main line. Of course, he would have to pull down quite a ways to get in the clear.

Q. Have you seen him go into the clear by the use of No. 2 track? A. I don't recall whether I have or not.

Q. Have you seen him go into the clear by backing into slow siding? A. Yes, sir.

Q. Are you advised, when you are in a yard, of the various moves that are going to be made? A. Hardly ever, no, sir.

Q. What instructions do you receive concerning moves in a freight yard? A. Never no special instructions. We use our best judgment in protecting the property.

Q. Is there anyone, so far as you know, who watches out for you there or are you to watch out for yourself? A. As a general rule I always look out for myself.

Q. Do you gentlemen follow any regular routine in doing your work or do you mix up the manner in which you do your work? A. Well, we wouldn't do it the same way all the time, especially when men are a little scarce. We go about it a little different, that is to keep any outsider from knowing our routine.

Q. Are the seals of First 209 cars out of Byrd Street ever checked by the special policeman in Byrd Street Yard?

A. Yes, sir. A lot of times when I was riding I would check at least one side of it before it got away.

Q. Do you know whether Sergeant Tiller ever checked seals in Byrd Street Yard? A. Yes, I have checked seals with him down there.

Q. At times you would also check them at Clopton Yard? A. Yes, sir.

Q. At times you would check them further down? A. We would try to check them further down if we had time, try to get up to as much as halfway of the train anyway.

CROSS EXAMINATION

By MR. SATTERFIELD:

Q. As a matter of fact, thievery on the Atlantic Coast Line Railroad by ingenious people who would even let rope

ladders down off the cars, kept you two boys pretty busy, didn't it? A. Well, that was our main reason for riding, to keep the cars from being broken into.

.

Q. You said a moment ago that the times that you had been over there and would see what was happening when they were making up 209, as a general rule the engine would cut off, the road engine and drop down into the yard to get into the clear; is that correct? A. Yes, sir, most of the time.

Q. Any other movement on the part of that road engine to get into the clear was unusual, wasn't it? I mean by that it didn't happen often. A. Well, I don't know. They didn't have any set place to get in the clear. They had several tracks that they could get into the clear.

.

Q. I want you to look at these gentlemen and tell them isn't it a fact that usually or generally, as you express it, the general rule was that the locomotive, the road engine that came over from Acca, went down over the crossover, and usually rested, waiting for the yard engine to make up the train in one of those pass-by tracks or, in some instances, on the southbound main line?

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A. Most of the time they did go down either to No. 1 track or the southbound main line. Occasionally they would back in on what is known as the slow siding, I believe.

Q. Occasionally? How many times did you ever see it do it actually, yourself? A. I don't remember any actual count but I have seen them do it a few times.

Q. Three or four times? A. I would say three or four times, yes, sir.

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MR. DENNY: We offer in evidence, if the Court please, the following stipulation entered into between the parties:

"The parties agree that if officials of the five railroads

operating in and out of Richmond, who are familiar with the practices on their roads and generally prevailing throughout the southeast were present, they would say:

"1. Most, if not all the railroads have lighted, by overhead lights some of their largest yards. Also in many smaller yards wherein a repair shop or a warehouse may be located, such outside lights as may be necessary for the purposes of the shop or warehouse have been installed, and from these lights the tracks in the immediate vicinity of the shop or warehouse receive some light. Some yards adjacent to street lights installed by a city, town or county receive some light therefrom. So far as is known to these witnesses, no yard of the size and character of Clopton Yard has been lighted by a railroad. The Chesapeake and Ohio Railroad Company has lighted such large yards as Newport News, Virginia, its Fulton Yard in Richmond, Virginia, its yard at Clifton Forge, Virginia, where its main line and its James River Division unite, and its Russell yard in Kentucky, which is the largest yard on that entire system. The Atlantic Coast Line Railroad Company has lighted its South Rocky Mount yard in North Carolina, it has lighted that portion of its Florence, South Carolina yard which surrounds the passenger station, and it has partly lighted its yard at Waycross, Georgia. These are the three largest yards on its system of road and are its main classification points. With the exception of its Fulton Yard, the Chesapeake and Ohio has not lighted its other yards in Richmond, wherein from time to time during the night some movements will take place, but in which movements are not continuous, or virtually continuous. The Southern Railroad has not lighted its yard in Richmond. The Acca Yard of the Richmond, Fredericksburg & Potomac, which is a primary interchange and classification point and is vere active day and night, is lighted. The Seaboard Air Line has three yards in Richmond, no one of which has it lighted. The South Richmond and Byrd Street yards of the Atlantic Coast Line have not been lighted by it.

"2. The railroads make it a practice, both in their large most active yards and in their smaller less active yards, not only to pull cars with the locomotive being in the lead position, but also to push cars with the locomotive in the rear position of the movement. When cars are thus pushed, it is not the practice of the railroads to place on the lead end of the movement a headlight similar to that carried by a locomotive, or otherwise to light the lead end of the back-up movement. Sometimes for some special purpose a man carrying a lantern may ride on the lead end of the movement. They are not only accustomed to push cars with the engine running forward, but also to push cars with the engine running in reverse.

"3. Road engines, equipped for road service, but not equipped with headlights for yard service, which bring cars into a yard, make such movement as may be necessary or convenient, to get the road engine alone, or the road engine and cars adjacent thereto, out of the way so that the yard engine may do the necessary classifying and switching work."

(The stipulation was filed and marked Defendant's Exhibit B.)

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N. F. ENGLISH, called as a witness by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. How long have you been one of the A. C. L. police sergeants? A. Right close to twenty years.

Q. Have you ever ridden train 209 from Acca to Rocky Mount? A. Yes, sir.

Q. Did you ever ride that train regularly? A. Yes, sir. I was assigned to that train regularly around 1934, I believe.

Q. Was Mr. Tiller also riding that train at that time? A. Yes, sir, part of the time.

Q. You rode it alternately? A. Yes, sir.

Q. After you were assigned to other runs did you, from time to time, take this run on First 209? A. Yes, sir, quite often I was coming into Richmond and would ride 209 back.

Q. Have you frequently been in Clopton Yards? A. Yes, sir.

Q. Have you frequently been in Clopton Yards when train 209 was being made up there? A. Yes, sir.

Q. Have you ever seen the road engine back cars up into slow siding so as to get in the clear to enable the yard engine to make up the train? A. Yes, sir.

Q. Have you seen the road engine get into the clear in other ways? A. Yes, sir, I have seen it do both ways.

Q. What other ways have you seen it get into the clear? A. I have seen it get in the clear on some other tracks beside that one.

Q. What other tracks? A. Other tracks in the yard. I am not familiar with the different names of the tracks.

.

Q. When you go into a yard in connection with your police duties, does anyone advise you what moves are going to be made by the engines in that yard? A. No, sir.

Q. What instructions do you receive? A. We don't receive any instructions at all.

Q. Is there any official or employee connected with the various crews whose duty it is to watch out for you special policemen? A. No, sir, we have to look out for ourselves.

Q. Do you follow, in doing your work, a regular routine, that is, do you do the various things you have to do in the same order and from the same places day after day and night after night? A. No, sir.

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CROSS EXAMINATION

BY MR. SATTERFIELD:

Q. Mr. English, are you a native of Richmond? A. No, sir, Rocky Mount.

Q. When did you come to Richmond to work with the Coast Line? A. I never worked—I never have been assigned to Richmond. I have rode trains from Rocky Mount back and forward between Rocky Mount and Richmond.

Q. Your assignment has been in Rocky Mount, has it? A. That is my headquarters, yes, sir.

Q. And you operate out of Rocky Mount? Do you operate out of Rocky Mount to the south? A. Yes, sir, we go as far as Florence.

.

Q. You said something a moment ago when you were testifying about 1934. A. I haven't rode 209 regular since 1934.

Q. You have not ridden it regularly since 1934? A. Not regular. I have rode it occasionally but not regular since 1934.

Q. When you say "occasionally", would you say three or four times a year? A. I would say three or four times or half a dozen times probably a year.

Q. Since 1934? A. Yes.

Q. So in the six years following 1934 you were in there five or six times a year? A. Something like that. I wouldn't say positively.

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J. M. PARRISH, called as a witness by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. What is your occupation? A. Passenger car distributor for the northern division, Atlantic Coast Line.

Q. How long have you occupied that position? A. Approximately six years or thereabouts.

Q. Is that one of the positions under the Superintendent of Transportation, northern division? A. That is right.

Q. I believe in 1940 Mr. J. A. Wall was Superintendent of Transportation? A. That is right.

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Q. State to the jury what were your duties in the month of March, 1940? A. They were the distribution of passenger equipment between various points on the northern division at places that needed certain class of passenger equipment and, in addition thereto, at that time I was making the monthly reports covering reportable injuries and accidents to the Interstate Commerce Commission and also to the Virginia Corporation Commission.

Q. When you prepared reports covering these reportable accidents, what did you do with the report after you had prepared it? A. It was prepared and placed on Mr. Wall's desk. He was Superintendent of Transportation—for his signature.

Q. I show you a certified copy of the report of an accident to Sergeant J. L. Tiller, accident occurring March 20, 1940, the report being made to the State Corporation Commission in April, 1940, and ask whether, in keeping with your duties, you prepared that report for Mr. Wall's signature? A. I did.

Q. In preparing that report did you have any personal knowledge of the matters related to? A. Absolutely not.

Q. From what source did you get information of this accident from which you prepared the report? A. There is a telegraphic report that is made covering all accidents. In this particular case the first information to reach the office was that telegraphic report which is filled in on a printed form.

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Q. Is the telegraphic report to which you refer this report on Form 18? A. Yes, that is right.

MR. DENNY: I offer in evidence, if the Court please, the telegraphic report referred to as Defendant's Exhibit C.

THE COURT: Is there any objection?

MR. SATTERFIELD: No, sir.

(This paper was filed and marked Defendant's Exhibit C and the following is a copy thereof:

ATLANTIC COAST LINE RAILROAD COMPANY

Telegraphic Report of Accident

46 55 X B

Rocky Mount NC March 20 21 1940 Station ———, 19—

To OHP JAW JET

Train Number	A	First 209	Kind of Train	F frt
Engine Number	B	1635	Place of Accident	G Clopton Yard Va
Name of		Date	H March 20th 1940	
Conductor	C	R. W. Wilbourne		
Name of		Hour	J 715 pm	
Engineer	D	W. M. Myrick		

1. Kind of Accident? Personal injury to J. L. Tiller between Clopton Yard office and road crossing south of yard office.
2. Is main line obstructed, and to what extent? No.
3. Can trains pass obstruction by running through pass or side track? Blank.
4. Cause of accident? Backed over J. L. Tiller.
5. Is cut, on embankment or on level ground, curve or straight track? Level and straight.
6. Speed of train at time of accident? about 6 miles per hour.
7. Who injured, and to what extent? J L Tiller, Company Policeman of 2904 Montross Ave Richmond Va left leg above knee crushed and left arm at elbow crushed was taken to Grace Hospital Richmond and hospital advise expect have amputate left leg and left arm and do not think Mr Tiller will live.
8. Is engine or tender off track, and in what position? blank
9. How many loaded cars off track?

11. How many empty cars off track?
12. How many cars behind obstruction?
13. How many cars ahead of obstruction?
14. How much track damage?
15. What material needed?
16. What force will be required to clear main line?
17. What time will be required to clear main line?
18. How many car trucks needed?
19. Remarks: Extra 1635, 15 cars stopped on hill at Clopton cut off three head cars in train and backed into slow siding at Clopton for Richmond yard engine to set south rocky mount cars to train on hill and extra 1635 was then to couple richmond package conn pick up to what he had out of Acca apparently Mr. Tiller standing on slow siding watching 62 cars being handled by yard engine passing on main line was backed over by INT Car 5168 being handled by engine 1635 backing into slow siding no witnesses to accident Dr Phillip Jones was called to attend Mr Tiller no apparent defect in Int 5168 but have car at Petersburg for day light inspection tomorrow

R G Murchison
1055am)

BY MR. DENNY:

Q. In addition to this report of Mr. Murchison which is dated March 20-21, what else did you have in your file at the time you prepared the report? A. I had a copy of a letter briefly outlining what had taken place which was signed by Superintendent Murchison and also Form 169-A, which is signed by the crew of Engine 1635.

MR. DENNY: I offer, first, as Defendant's Exhibit D the letter referred to by the witness dated April 4, 1940.

(This letter was filed and marked Defendant's Exhibit D and the following is a copy thereof:

Rocky Mount, N. C., April 4, 1940.
AX-17085

Mr. J. A. WALL,

Herewith file in re fatal injury Sergeant J. L. Tiller, Clopton Yard, March 20, at about 7:15 p. m.

Full reports from the Trainmaster and Captain of Police contain all the facts. The usual custom was for Mr. Tiller to ride cars from the Richmond Yard to Clopton and then continue south on train 209. The moves of the yard engine and road engine are explained. The inference is that Mr. Tiller stepped down from the cars being handled by the yard engine into path of road engine shoving into the slow siding.

Fireman P. W. Wright saw a lighted flash light lying between the slow siding and the southward main line. He mentioned this to his engineer. Investigation was made and Mr. Tiller's cap was found about forty feet north of the road crossing. He was found lying with his back to the outside rail on end of ties. Indications on the ends of the ties suggest that he was struck while standing on the north side of the crossing and dragged under arch bar of INT 5168 until train came to stop seventy-one feet north of the crossing.

Dr. Philip Jones and the City ambulance were summoned. Mr. Tiller was placed in an empty box car and carried to Hull Street by yard engine. There he was placed in the ambulance. He was taken to the Memorial Hospital but account no vacant room available he was carried to the Grace Hospital. There he died at 4:25 a. m., March 22.

The crossing at time of the accident was already occupied by the yard engine handling 209's cars. The crew of 209 carried out the rules. In that this is a major injury to be investigated by the Legal Department no statements were taken by the Trainmaster.

Mr. Robert Scott.

Superintendent.

Mr. C. E. Saint-Amand,

Letter is attached from M. O. K. Fike, Managing Director, Grace Hospital, enclosing bills in the amount of \$172.69, plus nurses bills for \$18.00.)

BY MR. DENNY:

Q. This is a carbon of a letter written by Superintendent Murchison? A. Yes, sir.

Q. When that carbon was sent to Mr. Wall's office were the reports from the Trainmaster and Captain of Police attached to it or did they go to some other point? A. I couldn't say definitely that they came with this letter because I didn't see that portion of the file, only this copy, and the two forms I have mentioned, is the only portion of the file I have seen but I presume what Mr. Murchison has said there was attached to the file.

Q. If it had been attached to the file and sent to your office, what, in the ordinary routine, would have been done with the report of the Trainmaster and Captain of Police?

A. The chief clerk of the office, in handling the correspondence, would have removed the investigation portion of the file and passed to the General Superintendent.

Q. The General Superintendent is a man different from the Superintendent of Transportation, is he? A. That is right.

MR. DENNY: The other paper that he had before him is Form 169-A which we wish to introduce as Defendant's Exhibit E.

(This paper was filed and marked Defendant's Exhibit E and the following is a copy thereof:

ATLANTIC COAST LINE RAILROAD COMPANY

Northern }
Southern } Division.

April 9th 1940

To Superintendent Transportation:

Report of (kind of accident) Personal Injury At 3 M. P., near Clopton, Va.

1. Date 3-20-40. 2. Time 7:15 P. M. 3. Daylight or Dark Twilight. 4. Condition of weather Clear. 5. Train No. Extra. 6. Direction South. 7. Engine No. 1635. 8. Conductor R. W.

Wilbourne. 9. Engineer W. M. Myrick. 10. Fireman P. W. Wright (white). 11. Trainmen R. D. Owen, R. L. Dickens. 12. Speed of Train at time of accident 4 M.P.H. 13. Number of cars in train 3. 14. Number of loads None. 15. Tonnage of train ———. 16. Number of cars ahead of disabled car(s) ———. 17. Number of cars behind disabled car(s) ———. 18. Main line or siding Siding. 19. On level, fill or cut Level. 20. Tangent or curve Tangent. 21. Ascending or descending ———. 22. What distance did train move after accident 71 feet. 23. If in yard, track number or name Side Track.

CAUSE OF ACCIDENT

24. State fully *cause* of accident Not known. 25. If accident was at switch, who was handling it? ———. 26. State actual position of each trainman at time of accident Dickens near by, Owen at rear. 27. What signals, if any, were given; by whom, and were they obeyed? None. 28. If caused by defective brake or coupling apparatus, or other defect in rolling stock, fully describe same and give car number and initial ———. 29. Was defect apparent or concealed? ———. 30. Defect card attached? ———. 31. When and where last inspected? ———. 32. By whom? ———. 33. If caused by defect in track, bridge or roadway, describe such defect fully ———. 34. If accident due to carelessness, state where responsibility rests ———. 35. Show below initials, numbers, contents of all cars involved, and extent of damage to same:

Initial	Number	Kind	Contents	Damage to Cars	Damage to Freight
I N T	5168	H	mty	None	

36. Damage to locomotive ———. 37. Time track was cleared ———. 38. Delays to trains ———. 39. Was car set out or taken forward? ———. 40. Was drawhead and attachments taken forward with car? ———. 41. If not, state exactly where left, and why not taken with car ———. 42. Estimated total damage to Company's prop-

erty ———. 43. General Remarks: (Describe fully just what happened and how it happened) It is assumed that Mr. Tiller got off cars yard engine brought to Clopton for us to pick up and backed into the cars we were backing into side track to clear for yard engine to make a switch to our train which was standing on old branch line.

I came to office, got way bills and returned to caboose as customary.

Did not know of accident until arrival at South Rocky Mount.

I certify that the above is a true and correct report.

R. W. WILBOURNE Conductor.

W. M. Myrick Engineer.

————— Yard Master.)

MR. DENNY: On the back of it is simply medical data which, unless you gentlemen desire to be read, I don't think it is necessary to read.

Q. Did you have any other papers in the file at the time this report was made up? A. None whatever except these memoranda transmitting those reports.

Q. Do these memoranda contain any information concerning the facts of the accident? A. Absolutely none.

Q. If there be a difference between the statement contained in the report filed with the Corporation Commission and in these reports you had before you, how do you account for that difference? A. The report to the Corporation Commission is not copied from those two reports. In preparing that report to the Commission, I first read these reports that have been submitted and only refer to them insofar as time, dates, and the like, are concerned. In the brief explanation on the bottom of the report is the memorandum that I read and these telegraphic reports.

CROSS EXAMINATION

BY MR. SATTERFIELD:

Q. Mr. Parrish, when does the telegraphic document get to you? A. I couldn't say as to what date. I would say

around the 12th or possibly the 15th of the month following that in which the accident took place.

Q. You mean this was not telegraphed on the company telegraph wire? A. Yes, but it did not reach me.

Q. You received the wire, didn't you? A. Oh, yes.

Q. Is this it? A. That was received in the office at the time shown on the bottom.

Q. What is the time? A. 10:55 A. M., March 21st.

Q. You put that in the file, didn't you? A. That is right.

Q. Then this letter from Mr. Murchison came down dated April 4th? A. That was doubtless received on the 5th.

Q. Then you put that in the file? A. That is right.

Q. Then you received this, as I take it, at the same time Mr. Murchison's report came to you? A. No, that came in later on possibly April 14th. The memorandum is dated April 13th.

Q. This memorandum is? A. No, this memorandum.

Q. I call your attention that this one is dated April 9th. You got it on the 13th of April? A. About that.

Q. And these were put in your files? A. That is right.

Q. Against the day you would make the report? A. That is right.

Q. Did you use them in making up your report? A. You mean the Commission's report?

Q. Those three documents when you made this for your superior, Mr. Wall. A. No, sir.

Q. Why not? A. That report to the Virginia Commission was made after the report to the Interstate Commerce Commission covering the same case which was prepared from these two forms.

Q. When you made the I. C. C. report you made a copy of that for the Corporation Commission? A. No.

Q. Later then you made this for the State Corporation Commission? A. Yes.

Q. But you took what you had already sent to the I. C. C. as your report to the State Corporation Commission? A. That is right.

Q. But at the time you made it for the I. C. C. you had these before you? A. That is true.

Q. Are you sure, Mr. Parrish, that that was all the information that came to your desk as to how this accident occurred? A. That is the entire file, just as I handed it there a minute ago.

Q. You are sure of it? A. Yes, sir.

Q. And you knew when you prepared this for your superior, Mr. Wall, that he was required to swear to it? A. That is right.

Q. And file it with both the Corporation Commission and the Interstate Commerce Commission? A. That is right.

Q. And with these things before you, you wrote into this report that "J. L. Tiller, white, 52 years of age, Police Sergeant of the ACL RR Co., went with yard engine taking cut of cars to Clopton, Va., to be placed in freight train stepped off engine upon arrival." You found that in those documents, so far as I have gone? A. I don't believe that is the exact wording in those two forms. I don't recall.

Q. "and was looking over the cars as they passed." Where did you get that from? A. Indicated in the form 169-A, I believe, that he was apparently watching other cars.

Q. "He was standing on adjoining track for this purpose." That is all right too? A. That is right.

Q. "when road engine with several cars ahead of the engine backed into this track and backed into Mr. Tiller." All of that is in those reports, is it not? A. That is right.

Q. And so you filed this report from those papers? A. With the one exception. I left one word in that report which is contained in both of these reports and also the report to the Interstate Commerce Commission.

Q. What word is that? A. "Apparent."

Q. Can you find anywhere in those reports the information that he was dragged down the track? I will first hand you Exhibit A. A. I see nothing in this particular form to indicate that.

Q. You put that in as an implication from his pistol, flash-

light and hat being found and the body on down the track? It was an assumption on your part? A. An assumption on my part.

Q. Because of the nature of his injuries? A. Yes, sir.

REDIRECT EXAMINATION

By MR. DENNY:

Q. Mr. Parrish, is the report to the Corporation Commission a verbatim copy of the report to the I. C. C. save for that word "apparent"? A. I couldn't say definitely that it is. It was not copied from the I. C. C. report.

Q. And I understand that when you made up the I. C. C. report you referred to this data you had in your file? A. That is right.

Q. Then subsequently you made up the report to the Corporation Commission? A. That is right.

Q. Did you make up the report to the Corporation Commission simply from memory or did you go back to the file? A. The only reference in making up the report to the Commission was the checking of the hearing of the Interstate Commerce Commission's report as to times, dates, etc., and then I went on with the explanation, as I remember having made it.

Q. You didn't check the factual statements, the facts of the accident, either with the data that you had in your file or with the copy of the report you had filed with the Interstate Commerce Commission? A. No. At the time I made this report I did not have the telegraphic portion of the file before me at all.

RECROSS EXAMINATION

By MR. SATTERFIELD:

Q. Is this a correct statement to the Corporation Commission? A. I haven't read that but I presume it is a copy.

Q. Read it and tell the jury if it is correct? A. That is a correct copy.

Q. I am asking you is that a correct statement? A. No.

Q. Wherein is it incorrect? A. I have made in this a positive statement as to what happened and I don't know what happened. If I had started with the word "apparently", it would have been a correct statement to the best of my knowledge.

Q. That is the statement you made and it is based on these documents, is it? A. That is right.

G. W. LINTON, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

Q. How long have you been an engineer on the Coast Line? A. Twenty-five years.

Q. Were you on duty the night that Mr. Tiller was fatally injured in Clopton Yard? A. Yes, sir.

Q. I don't think you understood my question. Were you an engineer there that night? A. Yes, sir.

Q. Of what train were you the engineer? A. I was carrying First 209 from Richmond to Clopton.

Q. You mean the yard engine from Byrd Street to Clopton? A. Yes, sir.

Q. When you went from Byrd Street to Clopton was your engine running forward or running backward? A. It was running backward.

Q. And pulling cars? A. Pulling cars.

Q. Did you see Mr. Tiller that evening? A. No, sir.

Q. Have you had experience in operating trains, both in lighted and in unlighted yards? A. Yes, sir.

Q. From your experience as an engineer, which yard do

you find is the easier in which to work and which, from your experience, is the safer? A. The unlighted yard.

Q. Why do you say that? A. Because the lights will shine right in your face at times and blind you and by the time you get out from that spot you are blinded and it is several seconds before your vision gets cleared up so that you will be able to see good again.

Q. On what kind of signals do you operate at night? A. Signals given with a lantern.

Q. Can you read the signals as easily in a lighted yard as in an unlighted yard? A. Sometimes you cannot see a signal in a lighted yard when it is in the ray of a light. It blinds out the lantern. It is impossible for you to see them at times.

CROSS EXAMINATION

By MR. SATTERFIELD:

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Q. Mr. Linton, I believe you have stated to the jury that you have seen him on numbers of occasions over there checking the cars—Mr. Tiller? A. Yes, sir.

Q. Will you tell the gentlemen of the jury where he very often stood to make that check? A. Mr. Tiller, when I would see him, would be around about different tracks. The train was always checked in the make-up in the yard and there was no specific place for him to be. I might see him in No. 5 track tonight and a little later I might see him around No. 2 track, just going around about.

Q. Was he on this run with you for any length of time? A. He has been over there quite a little while.

Q. What do you call quite a little while? A. I would say Mr. Tiller has been around there for ten or twelve years, to my knowledge.

Q. On that same job? A. Around the yard.

Q. In those same yards? A. Yes.

Q. Doing the same kind of work nightly? A. Yes, sir.

EDWARD F. ELLKE, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

Q. And how long have you been with the railroad? A. I judge thirty-seven or thirty-eight years.

Q. Were you the conductor on either of the trains that was in Clopton Yard on the evening Mr. Tiller was fatally injured? A. Yes, sir.

Q. You were the conductor of which train? A. Yard engine.

Q. Did you see Sergeant Tiller that afternoon or early evening? A. I saw him at Byrd Street Station.

Q. Where did you see him there? A. Well, we have what we call the wing of the bridge there. That was his position that he takes every evening to check the train.

Q. Is that on the north bank of the James River? A. Yes, sir, north bank.

Q. What time did you see him there? A. I judge around 6:30.

Q. Was that shortly before your train left Byrd Street Yard? A. Yes, sir.

Q. Did you see him thereafter? A. No, sir, I didn't see him after we left.

Q. Do you know whether he rode your train from Byrd Street to Clopton? A. No, sir, I do not.

Q. Have you worked in both lighted and unlighted yards? A. Yes, sir.

Q. Will you state to the jury from your experience which type of yard you find is the easier in which to do your work and which type of yard, from your experience, is the safer in which to do your work? A. I prefer the dark yard. The signals are more visible.

Q. Are there any other reasons? A. I think it is safer.

Q. Why? A. Because signals are more visible in yard work.

CROSS EXAMINATION

BY MR. SATTERFIELD:

Q. Mr. Ellke, you have been with the railroad company thirty-seven years. Do you know why the railroad companies are lighting their yards now? A. I don't know of any benefit, only to see.

Q. That is pretty good benefit, isn't it? A. Yes, to see by but when you are facing the light it blinds you.

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Q. Do you mean to tell this jury a man could not so protect his eyes as to benefit by lights in a railroad yard as between that and a dark yard? A. Well, the position he takes, if his back is toward the light, it is a benefit to him but when he is working against the light, it is a disadvantage to him.

Q. When a large yard is properly lit like Acca, for instance, do you say that yard should be avoided for one that is dark? A. I say I fell over a switch over there on account of the lights. I couldn't see the switch. The switch was located between the tracks.

Q. You prefer your dark yard at Clopton to one lit as well as Acca is? A. Yes, sir, I prefer the dark yard.

Q. You knew that night there was a car in the wrong place in that train? A. I never knew it until I arrived at Clopton.

Q. When you got to Clopton you knew about it? A. Yes.

Q. And you knew that occasioned the shifting movements there? A. Yes, sir.

Q. You were there that night. Will you state to the jury whether or not, in your opinion, it would have been easier for Mr. Tiller to have been seen that night had the yard been lighted? A. Could have been seen?

Q. Easier for him to have been seen. A. I don't know what position Mr. Tiller was in.

Q. Assuming that he was standing just north of Clopton Road, between the southbound rail and the slow siding. A. I judge he could have been seen.

REDIRECT EXAMINATION

By MR. DENNY:

Q. If Mr. Tiller had been standing there with a flashlight turned on, would Mr. Tiller and that light have been more clearly seen in a dark yard or lighted yard? A. Well, he flashed his light on the seals of the cars. He didn't have his light burning continuously. He just flashed his light on each car.

Q. Would that light be seen more easily as he flashes it in a dark yard or lighted yard? A. That is practically a signal in a dark yard. You could see it better.

RECROSS EXAMINATION

By MR. SATTERFIELD:

Q. You say he didn't keep the flashlight on all the time; it was coming on and off? A. He used it for each seal on each car.

Q. Will you take this flashlight. You are familiar with flashlights, aren't you, Mr. Ellke? A. To some extent. I don't use them very often.

Q. I want to ask you if you can tell the jury how that light is put on and off. A. He put it on this way and would catch the next car as it passed by while it was moving.

Q. You mean as he would see one seal he would wait until the next car got there and put it on the seal? A. Yes.

Q. Saving the battery? A. Saving the battery, I presume.

By MR. DENNY:

Q. You, of course, don't know whether Mr. Tiller was doing that on that night or not? A. No, sir, I didn't see him.

G. L. KING, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

* * * * *

Q. Were you connected with either of the train crews which were in Clopton Yard on the night Mr. Tiller was fatally injured? A. Yes, sir.

Q. With which crew were you connected? A. Mr. Ellke's yard crew.

* * * * *

Q. Did you see Sergeant Tiller that evening? A. No, sir.

Q. Did you see him in Byrd Street Yard that evening? A. No, sir.

Q. If he rode your train to Clopton Yard, do you know the position where he rode? A. No, sir.

Q. Have you worked both in lighted and unlighted yards? A. Yes, sir.

Q. From your experience as a trainman and doing the work you are called on to do, which do you prefer, a lighted or an unlighted yard? A. An unlighted yard.

Q. Why? A. Because you can see signals better.

Q. Have you any other reason? A. No.

Q. You can get a wider view.

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CROSS EXAMINATION

BY MR. SATTERFIELD:

* * * * *

Q. How long have you been working in those yards? A. I have been there twenty-five years.

Q. Always on the yard crew? A. Yes, sir.

Q. You never had any experience with the road engine crew? A. Only to see them come there and pick up a train is all.

Q. But you are familiar with what happens there each night, are you? A. Yes, sir, somewhat, I am.

Q. When the road engine comes over from Acca where does it usually go to get out of the way while the yard engine makes up 209? A. Different times he makes different moves.

Q. You mean the yard engine? A. No, sir. Sometimes the man will cut off and get out one way and then again he will cut off and back up so the yard engine can get there and do the work.

Q. They had a car out of place that night, didn't they? A. Yes, sir.

Q. And they had to put it in its proper place; is that right? A. Yes.

Q. Where did they have to put that car that was out of place? A. They had to put it in the Jacksonville classification, up to the hill on the road man's train.

TURNER A. COLE, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. Did you work for the Coast Line in March of 1940? A. Yes, sir.

Q. What position did you hold then? A. Fireman.

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Q. Were you on duty with either of the train crews in Clopton Yard on the night that Sergeant Tiller was fatally injured? A. Yes, sir.

Q. With which crew were you on duty? A. Mr. Ellke's crew.

Q. By that do you mean the yard crew? A. Yes, sir.

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Q. Did you see Mr. Tiller that night? A. No, sir, I did not.

Q. Did you see him at Byrd Street Yard before you left? A. No, sir.

Q. You did not see him on the train going over? A. No, sir.

Q. Or in Clopton? A. No, sir.

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Q. Have you worked both in lighted and in unlighted yards? A. Yes, sir, I have.

Q. From your experience in working in each type of yard, which do you find is the easier to work in and which is the easier in which to do your work? A. In Petersburg they have a lighted yard and when you are backing back in the yard it is right blinding for the man running the engine. You can't see very good because it seems to blind you, the way they have the lights fixed.

Q. What yard is that in Petersburg? A. That is in the Norfolk & Western yard.

Q. How about other yards or have you any preference between lighted and unlighted yards? A. I can't say that I have. I believe I would rather work in one that isn't lighted on account of it not blinding.

Q. It doesn't make much difference to you? A. No, sir. I believe I would rather work in one that isn't lighted because it doesn't blind you and you can see the moves you are making.

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RICHARD DUDLEY OWEN, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. Do you work with the Atlantic Coast Line? A. Yes.

Q. What position did you hold in March of 1940? A. Flagman.

Q. Were you connected with either of the train crews that were in Clopton Yard on the night Mr. Tiller was fatally injured? A. Yes, sir.

Q. With which crew were you connected? A. 209.

Q. What do you mean by 209? Was that the crew from Byrd Street or was it the crew from Acca? A. The crew from Acca.

Q. Who was your conductor? A. R. W. Wilbourne.

Q. Was anyone else in the caboose with you? A. Conductor.

Q. Mr. Wilbourne, the conductor? A. Yes, sir.

Q. What did you do when you got to Clopton? A. Stayed to the rear to protect the rear of the train.

Q. What did Mr. Wilbourne do? A. Went to Clopton Yard office to get his bills.

Q. Did he come back very shortly with his bills? A. Yes, I would say in ten or fifteen minutes.

Q. Then what did he do? A. Stayed on the cab and wrote the bills up and went on to Rocky Mount.

Q. Did you and he, from the time he got the bills, continuously stay there in the caboose? A. Yes, sir.

Q. Until you got to Rocky Mount? A. Yes, sir.

Q. When did you learn that Mr. Tiller had been hurt? A. At Rocky Mount, South Rocky Mount.

Q. Was Mr. Wilbourne back in your caboose prior to the time Mr. Myrick cut off with three cars on the front of your train, or could you tell? A. I couldn't tell.

Q. Is Mr. Wilbourne alive or dead now? A. He is dead.

Q. Have you worked in both lighted and unlighted yards? A. Yes, sir.

Q. From your experience, which type of yard do you find you prefer and which type of yard do you think is the safer in which to work? A. An unlighted yard.

Q. Why do you prefer the unlighted yard? A. You can see hand signals, lamp signals, better without obstructing from shadows. You can't see in shadows in an unlighted yard.

Q. Did you see Mr. Tiller at all on this day when he was fatally injured? A. No, sir.

L. E. HUDSON, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

Q: You are the General Yardmaster of the A. C. L. here at Richmond? A. Yes, sir.

Q. How long have you occupied that position? A. Since 1938.

Q. Were you on duty at Clopton Yard the night that Sergeant Tiller was fatally injured? A. Yes, sir.

Q. Were you out there? A. No, sir.

Q. Mr. Hudson, have you looked up the records to ascertain the number of the hopper car, the type and number, immediately behind the road engine operated on that occasion by Mr. Myrick? A. Yes, sir.

Q. What was the first of those hopper cars, the one right behind Mr. Myrick's engine? A. It was N. & W. empty coal hopper, empty hopper.

Q. Do you know the number of it? A. N. & W. 22020.

Q. Do you know what the exact type of the second hopper car was? A. Same type.

Q. Do you know the number of it? A. 22844 N. & W.

Q. Do you know the type of the third hopper car? A. Yes, sir, INT 5168, the same general type.

Q. Is there any data that you gentlemen have showing you the exact height of these various hopper cars? A. Yes, sir.

Q. What is the data that you have? A. The authority or the height?

Q. The authority. A. The Railroad Equipment Register.

Q. Is this the Railway Equipment Register? A. Yes, sir.

Q. With reference to these hopper cars, before you refer to this will you explain the data that it gives? A. It gives the type, all dimensions of the cars, and the cubic capacity and the number of doors and the entire information necessary in ascertaining the disposition to make of such cars.

Q. By whom is that published? A. Railway Equipment Register people.

Q. Will you turn there and state to the jury what was the height at the end of this hopper car immediately adjacent to Mr. Myrick's engine? A. N. & W. 22020, N. & W. 22000 to 25999, which governs both cars, the extreme height 12 foot 3 inches.

Q. That is the height on the ends? A. That is right.

Q. Is that taken from the rail? A. From the top of the rail to the top of the car.

Q. Was the second car also 12 feet 3 inches? A. Yes, sir.

Q. How about the third car, the one in which Mr. Tiller was found caught up? A. INT cars 5000 to 7009 (this car was 5168) over all 11 foot $9\frac{3}{4}$ inches in height.

Q. Do you know the engine that Mr. Myrick was operating that night? A. I know the class of engine, B-5.

Q. Have you data showing the height of the tender, the rear end of the tender on that engine? A. I do not have the data but I have measured it.

Q. What is the height? A. 10 foot 8 inches from the top of the rail to the top of the tank.

Q. If you had a regular headlight mounted on top of the tender, how far above the top of the tender would the top of that headlight be? Do you know the height of a headlight? A. The overall diameter of a headlight is $15\frac{1}{2}$ inches, standard type headlight which we use. That would bring that particular headlight—

By MR. SATTERFIELD:

Q. The diameter? A. The diameter of the headlight overall is $15\frac{1}{2}$ inches.

By MR. DENNY:

Q. What do you mean by "overall?" A. The rim, including the entire light from the bottom of it to the top of it, 15½ inches.

Q. How high did you say the tender was off the ground? A. The tender is 10 foot 8 inches. That would give you—the headlight would be 11½ inches mounted on the back of that tank.

Q. Hopper cars have no tops on them? A. No, sir.

Q. Have they a flange that runs around the rim of the top? A. Yes, sir.

Q. Have you ascertained what is the width of that flange on an INT car of this type on the ends? A. That is a 3-inch angle iron, making a flange 3 inches.

Q. Is that sufficient room on which to stand a lantern when cars are moving? A. Absolutely not.

CROSS EXAMINATION

By MR. SATTERFIELD:

Q. What sort of light, Mr. Hudson, did the tender of this locomotive, the road engine, have on it at the back that night? A. It had an ordinary small white light.

Q. What power light is that? A. I don't know.

Q. Is it very small? A. Very small.

Q. With the height of the gondola that was next to the tender, which I believe you said was 12 feet 3 inches, would the flange on top of that gondola be above the light that was on the engine that night? A. Yes.

Q. So that would hide that light from any movement in the direction from which the back-up movement was being made? A. Yes, sir.

J. A. CREWS, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

Q. How long have you been a car inspector for the Coast Line? A. Twenty-one years.

Q. And during that time have you worked very frequently here in the Richmond yards? A. All the time, yes, sir.

Q. Were you on duty the night Sergeant Tiller was fatally injured? A. Yes, sir.

Q. Did you have any work to do in connection with the cars that were subsequently carried by the yard engine out to Clopton for First 209? A. Yes, sir, I inspected them and tested air on them.

Q. Did you, after doing that, have occasion to go to Clopton Yard? A. Yes, sir.

Q. How did you go to Clopton Yard? A. I went there in my automobile.

Q. Did anyone go with you? A. No, sir.

Q. When you reached Clopton Yard had the road engine from Acca come into the yard? A. It hadn't showed up but a very few minutes after I got there he showed up.

Q. Had the yard engine from Byrd Street gotten there when you reached there? A. No, sir.

Q. You drove in on Clopton Road from the Petersburg Pike? A. From Petersburg Pike and drove right in here, right in between what we call the hill track and slow siding, parked my car right in here.

Q. You parked your car in the area between the old James River line and slow siding? A. Yes, just cleared the road.

Q. On the north side of Clopton Road? A. On the north side of Clopton Road.

Q. Was anybody else out there at Clopton Yard that night when you got there? A. I was the first one there.

Q. Then I understand you to say very shortly after you got there the road engine came in? A. Yes, sir.

Q. When you got there what did you do? A. I sat in the car until 209 showed up.

Q. Do you mean the road engine? A. The yard engine.

Q. You sat in the car until the yard engine came along? A. Yes, with the train.

Q. Then what did you do? A. After he blowed the road crossing I was getting out of the car, you see, starting on down where I make the coupling for the road engine.

Q. Let us get your movements in relationship to these tracks. Your car— A. It was parked right here.

Q. At the point you have indicated? A. Yes, sir.

Q. While the yard engine was coming in you got out of your car? A. Got out of my car.

Q. And which way did you walk? A. I walked south between slow siding and the main line. I was right in between them.

Q. Did you cross slow siding? A. I crossed slow siding in here somewhere. I don't know whether it was north of it or south of it but I crossed it.

Q. You crossed slow siding there at the crossing of Clifton Road? A. Yes.

Q. When you crossed slow siding to get in the area between southbound main line and slow siding had the yard engine come to a stop or do you know? A. I don't remember.

Q. Where was the road engine? A. The road engine had pulled down then.

Q. What do you mean by "pulled down"? A. Pulled down the old branch line here, the hill track, down to the switch, and when I got up there, as well as I remember, he was backing back. The brakeman was trying to back and was up on the car coming back.

Q. As you crossed slow siding did you see the brakeman on the head of Mr. Myrick's back-up movement, flagging Mr. Myrick back? A. Yes, sir.

Q. Had Mr. Myrick begun to back when you crossed slow siding by Clopton Road? A. I don't know, sir. I was right in here somewhere and I walked in between the two trains.

Q. As Mr. Myrick backed up and as you walked in between the slow siding and southbound main line, were you crowded in there or did you have room enough to walk?

A. It is room enough for you to walk but you can't make no mis-steps in there.

Q. Did you see, when you crossed slow siding there at Clopton Road, Sergeant Tiller? A. No, sir.

Q. Did you see anyone in that general locality with a flashlight? A. No, sir.

Q. Did you see any sign of a flashlight, either on or blinking on and off? A. No, sir. I was headed south.

BY MR. SATTERFIELD:

Q. You were what? A. I was going south.

BY MR. DENNY:

Q. Did you see Sergeant Tiller that evening at all? A. I went to see him in Richmond. I usually seen him every evening but I can't remember whether I saw him that evening.

Q. You can't remember whether you saw him at Clopton Yard? A. I didn't see him until after he was hurt.

Q. I understand you have frequently been in Clopton Yard? A. Yes, sir.

Q. Are any particular tracks regularly used in the make-up of First 209 there in Clopton Yard? A. No, sir, no special track.

Q. Have you ever been in Clopton Yard on occasions when the road engine, either by itself or pulling some other cars, had to get out of the way so that the yard engine might make up the train? A. Yes, sir. It happens real often.

Q. Will you state to the jury some of the various tracks that you have seen the road engine use as it gets out of the way to permit the yard engine to make up the train? A.

Well, I have seen them use the same track, slow siding as it is known, and 1 and 2. I have seen him use them all practically.

Q. At one time or another you have seen him use practically every track? A. Yes, sir.

Q. Is there any regular movement there that takes place or is it simply whatever movement may be convenient to handle the particular problem? A. That is right.

CROSS EXAMINATION

By MR. SATTERFIELD:

Q. Did I understand you to say, Mr. Crews, that you had seen Mr. Tiller before his death? A. No, I didn't see—

Q. I don't mean that night. I mean frequently on other occasions at night, looking after the inspection of the cars there in the yard? A. Oh, yes, sir, I have seen him there.

Q. Is it not a fact that he usually stood there between slow siding and the southbound main line to make that inspection with the flashlight? A. Well, I have seen him make the inspection there.

Q. You have seen him do it frequently there? A. Yes, I have seen him.

REDIRECT EXAMINATION

By MR. DENNY:

Q. You have also seen Mr. Tiller at many other points in Clopton Yard? A. Yes, sir.

Q. Inspecting seals at many other points? A. Yes, sir.

Q. In the years that you and he worked together in Clopton Yards, I take it, you have seen him at almost every place in the yard? A. Yes, sir, I have seen him everywhere.

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MR. DENNY: The defense rests.

THE COURT: Is there any rebuttal?

MR. SATTERFIELD: No, sir.

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MR. DENNY: I wish, if the Court pleases, to reiterate my first motion.

THE COURT: To renew it?

MR. DENNY: To renew my first motion that a verdict be directed for the defendant and for the reasons I stated earlier in the day.

THE COURT: That motion is overruled.

MR. DENNY: I now wish to renew my motion that the portion of the amended complaint which relates to the Boiler Inspection Act and to the rules and regulations of the I. C. C., promulgated thereunder, be stricken and that all the evidence which might have any relationship solely to the Boiler Inspection Act be stricken for the reasons heretofore stated.

THE COURT: That motion is overruled.

MR. DENNY: Exception is noted, of course, in each case.

There is another motion I want to make which I should like to make at this time. My motion is that the report filed with the State Corporation Commission be stricken from the evidence because the report is now shown by the evidence, and conclusively shown by the evidence, to be inaccurate. The report is not stated in accordance with the reports that came to Mr. Parrish. Mr. Parrish simply made a blatant mistake in the report to the Corporation Commission and I don't think that where an employee, who knows nothing about the matter of his own knowledge but who, in the nature of things, relies on other reports that come to him, binds the railroad if he erroneously reports to the State Corporation Commission. Mr. Wall, who signed the report, has testified that he knew nothing of the matter, that he had seen none of the reports in his office, and signed it as a matter of routine. Any high official has to do a great deal of routine. Mr. Parrish is the man who prepared the report. We have in evidence the data that Mr. Parrish had before him, which data shows that nobody knows what Mr. Tiller was doing. One statement says "apparently." The other statement says "It is assumed." The statements say

there were no witnesses and this report was originally admitted in evidence as an admission against interest. We have shown who made the report, that he knew nothing of his own knowledge, and that in making the report he didn't even follow the data he had before him and I say, under those conditions, a report of that kind is not entitled to any consideration by the jury.

THE COURT: I think the plaintiff is entitled to have it introduced in evidence as an admission against interest for what it is worth under all the facts and circumstances shown in the evidence, and the motion is overruled.

MR. DENNY: We note an exception.

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CHARGE TO THE JURY

THE COURT: Gentlemen of the Jury, this is a suit by Hattie Mae Tiller, widow and Executor of the Estate of John Lewis Tiller, against the Atlantic Coast Line Railroad Company, for damages in the sum of \$50,000.00 for the death of the said John Lewis Tiller, which the plaintiff claims was caused by the negligence of the defendant.

The suit is brought under what is known as the Federal Employers' Liability Act. The said Act gives to employees of common carriers by railroad engaged in interstate commerce, or their personal representatives, a cause of action against such railroad for damages for injuries or death resulting from the negligence of the railroad or any of its employees, or from any defect or insufficiency due to negligence in its cars, engines or other equipment.

It is conceded by the defendant that John Lewis Tiller died as a result of injuries received while employed by the defendant, which was then engaged in interstate commerce, and that the plaintiff has the right to maintain this suit in this Court for damages for the benefit of herself and the minor son of the decedent.

The plaintiff's case, stated briefly, is as follows: On or

about March 20th, 1940, in the afternoon but after darkness prevailed, the defendant through its employees was engaged in shifting cars in and about its yard known as Clopton Yard near Richmond, Virginia, in order to make up a southbound freight train; that at the same time John Lewis Tiller in the performance of his duties as an employee of the defendant was inspecting seals on cars in the yards; that the defendant on the occasion in question through its employees performed the said operation in a negligent manner, and that the defendant then violated the Federal Boiler Inspection Act by reason of certain defects or insufficiencies in the cars, engines or other equipment used in such operation, and as a proximate cause of such negligence and violation of law, a car propelled by the defendant's locomotive and operated by its train crew ran over and crushed the said John Lewis Tiller causing injuries from which he died.

The defendant is defending the suit on several grounds. The defendant contends that it was guilty of no negligence which was a proximate cause of the death of the decedent, and even if it were guilty of negligence, the decedent was also guilty of contributory negligence which efficiently contributed to his death.

This in a very general way outlines for you the issues of fact which you are called up to determine by your verdict in the light of the evidence you have heard and the law as explained in the charge of the Court.

Before explaining to the jury the law relating to the issues of fact raised by the evidence which has been adduced before you, I think it important to outline for you certain general principles of law which are controlling upon the jury in arriving at your verdict.

The Court charges the jury that this is a case of negligence, that is to say, the plaintiff claims the right to recover damages from the defendant by reason of its alleged negligence. Negligence is defined as the failure to do what a reasonably prudent man would have done under the same circumstances or doing what such person would not have

done under such circumstances. The plaintiff contends that the defendant was negligent in two respects, namely, (1) the failure to perform certain general duties owed by an employer to its employees; and (2) the failure to obey and observe certain statutes enacted by the United States for the safety of employees of carriers engaged in interstate commerce, as well as certain rules and regulations promulgated in pursuance of such statutes. It is therefore incumbent upon the plaintiff to satisfy the jury by a preponderance of the evidence that the decedent met his death as a result of the defendant's negligence. The plaintiff is not entitled to recover merely because of the happening of an accident.

The Court further charges the jury that it is not only necessary that the plaintiff should satisfy the jury by a preponderance of the evidence that decedent met his death as a result of the defendant's negligence, but the burden also rests upon the plaintiff to likewise prove that such negligence was the proximate cause of the injury which resulted in the death of the decedent. In order to establish that a negligent act or acts constituted a proximate cause of an injury, it must appear that the injury complained of was the natural and probable consequence of the alleged negligence, and that it ought to have been foreseen in the light of the attending circumstances.

The Court will hereafter explain to the jury the extent to which the defense of contributory negligence on the part of the decedent is applicable to the facts of this case. At this time it is sufficient to say that insofar as such contributory negligence is applicable, the burden is upon the defendant to prove negligence on the part of Mr. Tiller, unless it appears from the plaintiff's evidence or may be fairly inferred from all the facts and circumstances shown in the evidence.

Preponderance of the evidence does not necessarily mean the greater number of witnesses; it does mean the greater weight of all the evidence before the jury.

The Court charges the jury that they must not allow any sympathy they may feel for any person to influence their

verdict. A verdict, either as to liability or amount of damages, should not rest upon sympathy, surmise or conjecture, but must be based upon the evidence before the jury and the law as explained in this charge of the Court.

The credibility of witnesses, by which is meant their worthiness of belief and the weight to be given their testimony, is the peculiar function of the jury. There is no absolute or arbitrary guide or measure by which the jury may determine the truthfulness or untruthfulness of the witnesses. In determining the credibility of a witness, you should consider whether the witness has any reason or motive for being truthful or untruthful, whether there has appeared from the attitude or conduct of the witness any bias, prejudice or feeling which may cause his testimony to be influenced thereby, whether his testimony bears the mark of truthfulness or untruthfulness, and to what extent it is corroborated and confirmed by other testimony which is not questioned. You may also consider the intelligence or lack of intelligence of a witness and his opportunity to have accurate knowledge of the matters to which he testifies. In other words, you should consider the testimony of the witnesses in connection with all the facts proven and determine the degree of credibility you will give the witness and the weight you will give to his testimony.

As already explained to the jury the defendant is defending this suit on the ground that it was guilty of no negligence which was a proximate cause of the death of the decedent. In addition to said defense, the defendant has interposed a plea of contributory negligence on the part of the decedent which the defendant claims efficiently contributed to the death of Mr. Tiller.

In this connection, the Court charges the jury that contributory negligence on the part of the decedent can in no event serve to defeat a recovery by the plaintiff if the jury believe from the evidence that the defendant was guilty of negligence which was a proximate cause of the accident in which Mr. Tiller lost his life. And the Court further charges

the jury that the jury may not even consider the defense of contributory negligence in connection with the charge that the defendant violated the laws, and rules and regulations promulgated in pursuance of said laws, enacted and adopted for the safety of the employees of carriers engaged in interstate commerce. The Court further charges the jury that the jury may consider such defense of contributory negligence only in connection with the charge that the defendant was negligent in that it violated one or more of the above mentioned general duties which the defendant owed to its employees, and only for the purpose of mitigating the amount of damages the plaintiff is entitled to recover should the jury believe she is entitled to recover at all.

This brings me to the law of this particular case.

The Court charges the jury that the defendant on the occasion in question owed to its employees, including the said John Lewis Tiller, certain general duties. Among such duties were the following: (1) to exercise ordinary care to furnish its employees with a reasonably safe place to work; (2) to give adequate warning of any unusual or unexpected movement in making up its trains.

In addition to the general duties which the defendant owed its employees, there were, at the time of the accident, in full force and effect certain statutes enacted by the United States for the safety of employees of common carriers by railroad, known as the Federal Boiler Inspection Act, as well as certain rules and regulations promulgated by the Interstate Commerce Commission in pursuance of such statutes, which it was the duty of the defendant to obey and observe.

The Court charges the jury that it was the duty of the defendant to exercise ordinary care to provide the decedent with a reasonably safe place to work, that is to say the degree of care that persons of ordinary prudence engaged in the same business would have exercised under like circumstances. And if the jury believe from the evidence that on the occasion in question, taking into account all the facts

and circumstances shown in the evidence, the defendant failed to perform such duty and as a proximate result of such failure the plaintiff's decedent received injuries from which he died, then the jury should return a verdict for the plaintiff.

The Court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the engine and cars of the defendant were making a back-up movement on the night of March 20th, 1940; that such movement was an unusual and an unexpected one and a departure from the general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe that such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believe from the evidence that the defendant failed to perform such duty and as a proximate result of such failure, Mr. Tiller received the injuries from which he died, then the jury should return a verdict for the plaintiff.

The Court charges the jury that Clopton Yard is used by the defendant for the purpose of classifying its cars and making up its trains, and that a locomotive used in said yard in classifying cars and making up trains is engaged in yard service. If the jury believes from the evidence that the road engine, on the night Mr. Tiller was injured, in making the movements it made in said yard was being used by the defendant to classify its cars and make up its train, then the said engine was then being used in yard service. On the other hand, if the jury believes from the evidence that the said road engine was backing into slow siding for the purpose of getting out of the way of the yard engine so that said yard engine could classify cars and make up trains, then said locomotive in making said movement was not being used in yard service.

The Court further charges the jury that the Federal Boiler Inspection Act and the rules of the Interstate Com-

merce Commission adopted pursuant thereto require that a locomotive used in yard service between sunset and sunrise should have two lights, one on the front of the locomotive and one on the rear, each of which should enable a person in the cab of the locomotive who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of at least 300 feet ahead and in front of such headlight. If the jury believe from the evidence that the decedent was struck, between sunset and sunrise, by a car which was being pushed by a locomotive and that said locomotive was then being used in yard service and that said locomotive did not have a rear light as prescribed by said rule and as a proximate result of such failure to have such a light on the rear of such locomotive the said Tiller received injuries from which he died, then the jury should return a verdict for the plaintiff.

The Court charges the jury that a railroad is not bound to maintain its yards in the best or safest condition. To such extent as any statute or regulation promulgated pursuant to statute requires any specific mechanical device or facility, the railroad must furnish it, but no statute or regulation requires it to light its yards.

The plaintiff has offered in evidence certain rules from the rule book issued by the defendant to its employees. The Court charges the jury that if they believe from the evidence that the defendant violated these rules then the jury may consider such violations along with all the facts and circumstances in this case in determining whether the defendant was guilty of negligence which proximately caused the injury to the decedent.

If the jury believes from the evidence and under the charge of the Court that the plaintiff is entitled to recover, then in fixing the damages to which the plaintiff is entitled the jury may take into consideration the following:

(1) The pecuniary loss sustained by the widow and minor son of the deceased to be determined in the light of his prob-

able earnings during what would have been his normal lifetime if he had not been killed and considering his age, intelligence and health at the time of his death.

(2) The probable lifetime of the deceased may be determined by the jury according to the recognized scientific tables relating to human life.

(3) A sum of money deemed fair and just by the jury for the loss of care, attention and society of Mr. Tiller to his surviving widow and child.

(4) A sum of money deemed fair by the jury by way of solace and comfort for the sorrow, suffering and mental anguish occasioned by the widow and child of the decedent.

(5) The pain and suffering experienced by Mr. Tiller between the time of his injuries and his death.

The Court charges the jury that should they return a verdict for the plaintiff such verdict should be in the following form:

"We, the jury, on the issue joined, find for the plaintiff, and assess the damages at \$———."

September —, 1943.

Foreman

The Court charges the jury that should they return a verdict for the defendant such verdict should be in the following form:

"We, the jury, on the issue joined, find for the defendant."

September —, 1943.

Foreman

To summarize briefly, gentlemen of the jury, the Court again says to you that this is a case of negligence, that is to say, the plaintiff's right to recovery is dependent upon whether or not the defendant has been guilty of negligence. The jury should first consider whether or not the defendant was guilty of negligence and whether or not such negligence, if they jury believes it existed, was a proximate cause of the

injury and resulting death of the decedent. If you find neither of these conditions existed, you should return a verdict for the defendant. On the other hand, if you believe both of such conditions existed, you should next consider whether or not Mr. Tiller was also guilty of negligence which efficiently contributed to his death. If you believe from the evidence he was not, then you should return a verdict for the plaintiff and award damages in such sum as will fully and fairly compensate for the injury and death of the decedent. However, if you believe from the evidence that the defendant was guilty of negligence which was a proximate cause of the accident in which decedent lost his life, and further believe that the decedent was also guilty of negligence which efficiently contributed to his own death, then you should first determine the whole amount of damages sustained by reason of the injury and death of Mr. Tiller, and having done so, you should, provided you believe from the evidence and under the law as hereinbefore explained to the jury that such contributory negligence should be considered by the jury, diminish the whole amount of such damages by deducting therefrom such part thereof as you may believe from the evidence is justly and fairly attributable to the negligence of Mr. Tiller, and return a verdict for the plaintiff for the balance which remains.

If there is any matter that I can assist the jury with, I will be glad to do so.

Do you gentlemen, before the jury retires to deliberate, wish to state any additional objections to the charge of the Court?

MR. DENNY: I think it would be advisable. Under Rule 51^a we would be compelled to do it at this time.

THE COURT: Gentlemen, step out in the hall.

(The jury retired)

THE COURT: Mr. Denny, there is no use in putting into the record now any matter that you have heretofore brought to the attention of the Court. Has the plaintiff anything to put in?

MR. GARY: I could not recall whether our objections to the instruction on proximate cause were recorded or not. Our objection to any reference to promixate cause in the instructions is based upon our contention that under the Federal Employers Liability Act, the question of proximate cause has been eliminated by the Act itself and that the plaintiff is entitled to recover for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, and that the expression in the law "injury or death resulting in whole or in part from the negligence of the officers," etc., determines the negligence for which the plaintiff is entitled to recover and that that eliminates the question of proximate cause.

THE COURT: I think you have made that point before and I am glad to have you put it in the record but I will not change my charge on that account.

MR. GARY: The other objection is that in its request for instruction, the plaintiff asked for an instruction that it was the duty of the defendant in this case to exercise reasonable care to provide the decedent Tiller with a reasonably safe place to work which included care in establishing a reasonably safe system or method of work. The "reasonably safe system or method of work" was eliminated.

As I recall the instruction with reference to whether or not the engine was engaged in road service, the Court instructed the jury that if they believed from the evidence that the engine which struck Tiller backed into slow siding to get out of the way while the yard engine was classifying the train, then it was not engaged in yard service. We think that that should be "merely backed in for that purpose." If it backed in for that purpose and other purposes, then we feel that we are entitled to the instruction.

THE COURT: I think that point is fully covered by the instruction.

MR. DENNY: If the Court pleases, simply to make sure that the objections which we will dictate in full have been

covered by the Court, we will object to this instruction upon the ground, first—

THE COURT: Which instruction?

MR. DENNY: I will point out the reasons. I don't know the numbers that may be there. It is the Court's instruction on the unusual and unexpected movement.

THE COURT: You have put that in the record?

MR. DENNY: We have mentioned that heretofore, I know. We object because the Court should, under the facts of this case, have instructed as a matter of law that this engine was engaged in road service and we will further object upon the ground that the Court did not include in its instruction the statement that no statutory regulation requires that if an engine pushes a car within a yard at night a light be placed on the head end of the back-up movement.

We further object because the Court did not—

THE COURT: You cannot negative every requirement. I cannot tell the jury what is not the duty; I can only tell them what is the duty.

MR. DENNY: I understand, but we still object upon that ground. I wanted to be sure that all of my points are properly saved.

THE COURT: The object of these objections is to attempt to have the Court change the charge.

MR. DENNY: I thought I needed to be sure that I had stated what they were before the jury retired. I did not want to engage in any further argument on the instructions. As I understand the Court's interpretation of Rule 51, even after the jury has retired we can state these things and that is in keeping with Rule 51.

THE COURT: All right.

(The jury returned to the court room)

THE COURT: Gentlemen, retire and deliberate upon your verdict.

The jury retired to consider its verdict and later returned a verdict in the following words:

“We, the jury, on the issue joined, find for the plaintiff and assess her damages at \$22,500.00.”

MR. DENNY: If the Court pleases, the defendant moves to set aside the verdict.

THE COURT: May I suggest that you have ten days in which to make a motion and state your grounds. Is there anything further?

MR. DENNY: May I do this with these objections to the instructions which I have summarized in longhand—may I have them written up on the typewriter and submitted to the Court?

THE COURT: Tomorrow.

Thereafter Mr. Denny filed the following objections to the charge:

The defendant objects to the charge of the Court to the jury upon the following ground:—

1. The Court should have charged that the road engine from Acca was engaged in road service during the back-up movement into slow siding, when J. L. Tiller was injured, and the Court erred in leaving the question whether the movement was one in road or yard service to the determination of the jury, as there is no evidence upon which to predicate a finding that said engine was engaged in yard service. This question is one of law to be determined by the Court.

2. The Court should have charged there was no evidence upon which there could be predicated a finding that defendant was negligent, because the manner in which J. L. Tiller received his injuries is purely speculative and conjectural.

3. There is no evidence upon which to predicate a charge concerning an unusual or unexpected movement or a departure from a general practice in the movement during which the injuries were sustained. The Court should have charged that there was no evidence of an unusual or unexpected movement or a departure from a general practice, of which plaintiff's decedent should have been warned.

4. Those portions of the charge which relate to the matter of an unusual or unexpected movement and a departure from general practice do not correctly state the principle of law governing such matters. If proper to instruct on these points, the Court should have instructed in effect as follows: that if the jury believed from the evidence that by practice or otherwise a custom had been established in Clifton Yard against the backing of cars into slow siding, and that this custom had been established for the benefit of members of the police force and/or others, and that this custom had been violated without warning to J. L. Tiller, and that such violation was a proximate cause of his injuries, then its verdict should be for the plaintiff.

5. The Court should have charged that no applicable statute or regulation adopted pursuant to applicable statute imposes the duty upon the defendant to place a light of any kind on the lead end of a car or cars that are being pushed by a locomotive in the nighttime.

6. The Court should have charged that such matters as the space to be maintained between tracks in railroad yards and other engineering questions are left to the decision of the railroad, and its decision on such matters is not reviewable by the jury. Such matters are not to be left to the uncertain and varying opinions of juries.

7. The Court should have charged that the report to the Virginia State Corporation Commission, filed as an exhibit by plaintiff, could not be considered by the jury.

8. The Court should have charged that Rule 24 from Defendant's Rule Book was not material and that the jury must disregard it.

9. Similar charge should have been made with reference to Rule 103 from said Rule Book.

10. The Court erred in charging that if the jury found for the plaintiff, it might, in assessing damages, consider the loss to the widow and child of the care, attention and society of plaintiff's decedent.

11. The Court erred in charging that if the jury found

for the plaintiff, it might, in assessing damages, consider the suffering and mental anguish of the widow and her minor child.

12. The Court erred in charging that if the jury found for the plaintiff, it might, in assessing damages, consider the pain and suffering of plaintiff's decedent.

PLAINTIFF'S EXHIBIT No. 3

Report of Accident resulting in
injury to persons, equipment or
roadbed.

(State Corporation Commission)

(April 24, 1940)

(Va.)

To the Honorable State Corporation Commission,

RICHMOND, VIRGINIA.

The Atlantic Coast Line Railroad Company makes the following

REPORT OF AN ACCIDENT

which occurred near Clopton, Virginia, Station on the 20th day of March, 1940, at 7:15 o'clock P. M.

Nature of Accident

Police Officer of the Railroad Company struck and partly passed over by freight car in yard.

Name of Each Person Injured and Nature and Extent of Injury.—J. L. Tiller, white, 52 years of age, Police Sergeant of the ACL RR Co., went with yard engine taking cut of cars to Clopton, Va., to be placed in freight train stepped

off engine upon arrival and was looking over the cars as they passed. He was standing on adjoining track for this purpose when road engine with several cars ahead of engine backed into this track. He was struck by the first car and dragged several feet receiving injuries which resulted in death in Grace Hospital, Richmond, Va., at 4:25 A. M., March 22nd, 1940.

Damage to Equipment

None

Damage to Roadbed

None

(Sign Here)

J. A. WALL

(Title)

Superintendent Transportation

To be forwarded to State Corporation Commission at end of calendar month, with abstract of all accident reports to that Department for such month.

COMMONWEALTH OF VIRGINIA

(Seal of Virginia)

DEPARTMENT OF THE

STATE CORPORATION COMMISSION

I, N. W. Atkinson, Clerk of the State Corporation Commission do hereby certify that the foregoing is a true copy of report filed by Atlantic Coast Line Railroad Company covering an accident on March 20, 1940, which resulted in the death of J. T. Tiller.

In Testimony Whereof I hereunto set my hand and affix the Official Seal of the State Corporation Commission, at Richmond, this 28th day of August, A.D. 1941

(Seal of State Corporation Commission)

(Sgd)

N. W. ATKINSON,

Clerk of the Commission.

MOTION OF DEFENDANT THAT THE VERDICT BE SET ASIDE AND THE JUDGMENT BE ENTERED IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT, AND IF THIS MOTION IS NOT GRANTED, THE MOTION OF DEFENDANT FOR A NEW TRIAL.

(Filed September 8, 1943)

Defendant moves that the verdict of the jury be set aside and that judgment, notwithstanding the verdict, be entered for Defendant in accordance with its motion for a directed verdict made at the conclusion of Plaintiff's evidence and renewed at the conclusion of all the evidence, and assigns as the ground of its motion the following:

There was no evidence before the jury from which it could be concluded that the Defendant was guilty of any actionable negligence; there was no evidence before the jury from which it could be concluded that the Defendant violated the Boiler Inspection Act or the Rules and Regulations of the Interstate Commerce Commission, made pursuant thereto; there was no evidence before the jury from which it could have been found that negligence of the Defendant, if any, or violation of said Rules and Regulations, if any, was the proximate cause of the injuries and death of plaintiff's decedent. The verdict of the jury is, of necessity, based solely on speculation and conjecture.

In the event the foregoing motion should be overruled, then Defendant moves that said verdict be set aside and that a new trial be granted, and assigns as the grounds of its motion the following:

1. The Court erred in permitting the Plaintiff to file an amended complaint raising for the first time the question of a violation of the Federal Boiler Inspection Act and the Rules and Regulations promulgated pursuant thereto, more than three years after the cause of action had accrued and, in overruling Defendant's motion that the allegations re-

lating to these matters be stricken from the amended complaint.

2. The Court erred in admitting into the evidence, over Defendant's objection, the report made to the State Corporation Commission of Virginia, and which report was permitted to be filed as one of Plaintiff's exhibits.

3. The Court erred in overruling the motion of Defendant that said report be stricken from the evidence.

4. The Court erred in overruling the motion of Defendant that Rule 24 from Defendant's Rule Book, issued to Defendant's employees be stricken from the evidence.

5. The Court erred in overruling the motion of Defendant that Rule 103 from Defendant's Rule Book issued to Defendant's employees be stricken from the evidence.

6. The Court erred in its charge to the jury in the particulars set forth in Defendant's objection to that charge.

7. The verdict of the jury is against the weight of the evidence.

8. The verdict of the jury is without evidence to support it and contrary to the evidence.

MOTION

(Filed September 24, 1943)

Comes now the plaintiff in this action, by her counsel, and moves the court to strike from the exceptions filed by the defendant to the instructions given to the jury, paragraphs 10, 11 and 12 thereof, the grounds for said motion being that the defendant did not object to the giving of that portion of the Court's instruction or charge which related to the ascertainment of damages before the jury retired to consider its verdict.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA

AT RICHMOND

HATTIE MAE TILLER, Executor
of the Estate of JOHN LEWIS

TILLER, deceased,

Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD
COMPANY, a Virginia corporation,

Defendant.

CIVIL ACTION
FILE NO. 129

ORDER OVERRULING MOTION AND ENTERING
JUDGMENT

(Entered and Filed November 10, 1943)

This cause came on this day to be heard on plaintiff's motion to strike paragraphs 10, 11 and 12 from the objections to the charge of the Court to the jury filed by the defendant and on the motion of the defendant that the verdict of the jury be set aside and that judgment be entered in accordance with the defendant's motion for a directed verdict and the motion of defendant for a new trial.

Upon consideration whereof, it is ordered that the said motion of the plaintiff be granted and that paragraphs 10, 11 and 12 be, and the same hereby are, stricken from the objections to the charge of the court to the jury filed by the defendant, and that the said motion of the defendant to set aside the verdict of the jury and enter judgment in accordance with defendant's motion for a directed verdict and its said motion for a new trial be, and the same hereby are, overruled.

It is further ordered that plaintiff recover of defendant the sum of \$22,500.00, with interest at the rate of 6% per annum from the 3rd day of September, 1943, together with her costs in this behalf expended.

The defendant having announced its intention to take an

appeal from the said judgment of the Court, it is ordered that the execution of and any proceedings to enforce this judgment be, and the same hereby are, stayed pending appeal upon the defendant executing within the period of 20 days from the date hereof a supersedeas bond in the sum of \$25,000.00, conditioned and payable as the law directs and with surety to be approved by this Court.

November 10, 1943.

ROBT. N. POLLARD,
United States District Judge.

[fol. 199] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

No. 5217

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellant,

VERSUS

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

January 3, 1944, the transcript of the record is filed and the cause docketed.

Same day, original exhibit (aerial map) is certified up.

January 4, 1944, the appearance of J. M. Townsend is entered for the appellant.

Same day, the appearance of J. Vaughan Gary and Dave E. Satterfield, Jr., is entered for the appellee.

January 5, 1944, the appearance of Collins Denny, Jr., is entered for the appellant.

February 2, 1944, statement under section 3 of rule 10 is filed.

Same day, stipulation as to joint appendix is filed.

[fol. 200] March 6, 1944, petition of appellant for leave to file brief in excess of fifty printed pages is filed.

ORDER GRANTING LEAVE TO FILE BRIEF IN EXCESS OF FIFTY
PAGES--Filed March 8, 1944

(Style of Court and Title Omitted)

Upon the petition of the appellant, and for good cause shown,

Special Leave is hereby granted appellant to file brief in excess of fifty pages, but not exceeding eighty-five printed pages, in the above entitled case.

March 7th, 1944.

John J. Parker, Senior Circuit Judge.

March 18, 1944, brief on behalf of the appellant is filed.

Same day, joint appendix to briefs of the parties is filed.

April 4, 1944, brief on behalf of the appellee is filed.

ARGUMENT OF CAUSE

April 17, 1944 (April term, 1944) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Same day, original exhibit (flashlight) is sent up.

[fol. 201] OPINION—Filed May 15, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5217

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellant,

VERSUS

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

(Argued April 17, 1944. Decided May 15, 1944)

Before Parker, Soper and Dobie, Circuit Judges

Collins Denny, Jr., (J. M. Townsend on Brief) for Appellant, and J. Vaughan Gary (Dave E. Satterfield, Jr., on Brief) for Appellee

[fol. 202] SOPER, Circuit Judge:

This case, now before us for the second time, relates to the accidental death of John Lewis Tiller, a sergeant of railroad police, while engaged in the performance of his duties in the Clopton freight yard of the Atlantic Coast Line Railroad Company near Richmond. In our former opinion (128 F. 2d 420) we affirmed the action of the District Court at the first trial in directing a verdict for the defendant carrier on the ground that the evidence disclosed no negligence on its part. We recognized that the common law defense of assumption of the risk was eliminated in cases under the Federal Employers Liability Act when §4 of the Act was amended in 1939, 45 U. S. C. A. 54, so as to

provide that in any action brought under the Act to recover against a carrier for the injury or death of an employee of the carrier, such employee shall not be held to have assumed the risk of his employment where his injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of the carrier. But we concluded that no recovery from the carrier could be had because the evidence did not indicate any negligence on its part but rather that the accident resulted from the negligence of the deceased or from his exposure to the risks which are inherent in the business of railroading notwithstanding the performance by the carrier of its duty to its men. In so doing we interpreted the amended statute to mean that while an employee of a carrier does not assume the risk of his employment in any case where injury or death results from the carrier's negligence, he does assume the risk of injury which results not from his employer's negligence but from the intrinsic nature of his dangerous occupation.

No one saw the accident but the evidence at the first trial warranted the inference that the accident occurred under [fol. 203] the following circumstances: Every evening the carrier operated a freight train from Richmond to the South which was made up at the Clopton Yard. Tiller had been a member of the Railroad Police Force for sixteen years and for a number of years had been assigned to the protection of this train. He was engaged in this work about 7 P. M. on March 20, 1940, when he was hit by the head car of three cars that were being pushed in a northerly direction by the road engine in a slow back-up movement in the course of the shifting operations. The tracks ran north and south at the point of the accident and Tiller was standing between two of the tracks or on the more westerly of the two tracks, while using a flashlight to examine the seals on the doors of the cars on the track to the east without observing that the three cars in the back-up movement were approaching him on the track to the west. The night was dark and the yard was unlighted. There was no light on the head car of the back-up movement except that a brakeman holding a lighted lantern was riding on the step at the northwest corner of the car in order to protect a cross highway known as Clopton Road which the cars were about to cross. The bell of the engine was ringing.

The shifting of cars in the freight yard was a necessary and customary operation in the make up of the train; and

the carrier's employees had been instructed that they must watch out for the movement of the trains as no employee watches out for them and no lights are used at night on the head end of back-up movements except when an employee is placed at the back end with a lantern to protect a road crossing. In regard to this practice it was expressly stipulated at the second trial in the District Court, now under review, that both in their large and most active yards and in their smaller and less active yards railroads make it a practice not only to pull cars with the locomotive in the lead position but also to push cars with the locomotive in the rear [fol. 204] position of the movement. When cars are thus pushed it is not the practice of railroads to place on the lead end of the movement a headlight similar to that carried by a locomotive or otherwise to light the lead end of the back end movement. Sometimes for a special purpose a man carrying a lantern may ride on the lead end of the movement. Cars are not only pushed with the engine running forward but also with the engine running in reverse.

Upon our affirmance of the judgment of the District Court at the first trial, the Supreme Court granted certiorari and reversed, *Tiller v. Atlantic Coast Line*, 318 U. S. 54. The court made it clear (p. 58) that "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to non-negligence"; and the court held (p. 68) without specifying the particulars wherein the defendant had failed to perform its duty, that upon the facts recited "the question of negligence on the part of the railroad and on the part of the employee should have been submitted to the jury."

Since the evidence at the second trial in respect to the movement of the cars was substantially the same as at the first, this decision required the District Judge notwithstanding the opposition of the defendant to submit the case to the jury. Our duty upon this appeal to affirm the judgment of \$22,500 for the plaintiff based upon the verdict would have been equally clear if the plaintiff had been content at the second trial to rest upon the legal theory outlined in the opinion of the Supreme Court; but the plaintiff amended the complaint by specifying a new item of negligence which was [fol. 205] submitted to the jury as an alternative ground for

recovery. Since the verdict for the plaintiff was general and did not specify the ground on which it rested, it becomes necessary for us to determine whether there was sufficient evidence to justify the submission of this new theory to the jury over the defendant's objection.

The plaintiff was permitted to amend the complaint at the second trial so as to add the allegation that the carrier had violated the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A. §§ 22 to 34, by using a locomotive which was in improper condition and unsafe to operate in that it did not have proper lights between sunset and sunrise, as prescribed by the rules of the Interstate Commerce Commission promulgated pursuant to the statutes. One of these rules makes the following provision:

"131. Locomotives used in Yard Service.—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

The road engine that was pushing the cars that injured Tiller did not have such a light on its rear end as is described in the rule but only a small electric bulb situated on the top of the tender below the top of the cars that were being pushed.

The defendant objected to the allowance of the amendment on the ground that it did not charge an act of common law negligence but the violation of a statutory duty and therefore set up a new cause of action which was barred by the expiration of three years period of limitations imposed by the Federal Employers' Liability Act. We do not need to consider this question in the view we take of the subsequent [fol. 206] developments of the case. At the conclusion of the evidence the court charged the jury that the defendant owed to Tiller the general duties to exercise ordinary care to furnish its employees a reasonably safe place of work and to give adequate warning of any unusual or unexpected movement in making up its trains, and that if the jury believed from the evidence that the defendant failed to per-

form either of these duties and as the proximate result of such failure Tiller received the injuries from which he died, then the verdict should be for the plaintiff.

In addition the court charged the jury that it was the duty of the defendant to obey the rules promulgated by the Interstate Commerce Commission pursuant to the Federal Boilers Inspection Act; and that if the road engine of the defendant was being used at the time of the injury to classify the cars and make up a train, it was being used in yard service within the meaning of the rule, and if the jury believed from the evidence that Tiller was struck by a car pushed in yard service by a locomotive that did not have a rear light, as prescribed by the rule, and as a proximate result of this failure Tiller received fatal injuries, the verdict of the jury should be for the plaintiff.

At the end of the plaintiff's case and at the end of the whole case, the defendant moved for a directed verdict upon the specific grounds, amongst others, that the evidence disclosed no violation of the Boiler Inspection Act or of the rules promulgated thereunder because the locomotive in question was not being used in yard service at the time of the accident; and also upon the ground that even if the locomotive was then being used in violation of the rule there was no evidence to show that the violation was the proximate cause of the accident. The defendant also moved to strike out the amendment of the complaint and the evidence in respect to the Boiler Inspection Act. All these motions [fol. 207] were overruled and the correctness of the charge on this aspect of the case must therefore be considered.

We shall assume that the locomotive, although a road engine, was being used in yard service when, in order to make up the train, it was shifting certain cars while the yard engine was shifting others; but it is still necessary to determine whether the absence of a rear light on the tender of the road engine had any bearing on the accident. The evidence showed that if the tender of the road engine had been equipped with a rear searchlight, it would not have shone out so as to enable a person in the cab to see a dark object on or near the track 300 feet ahead in the direction of the backward movement, as contemplated by the rule. Nor would the light have been visible to one standing at or near the track ahead of the movement. The light would have been obscured by the cars which the engine was pushing because the car next to the tender was higher than a

searchlight mounted on top of the tender would have been. Such a light would have shone against the end of the adjacent car and would have been diffused at that point and would not have illuminated the area ahead of the cars.

The plaintiff contends that it would be a violation of Rule 131 for a carrier to permit the headlight of an engine in yard service to be obscured by cars that it is pushing, but this is tantamount to saying that an engine may not push cars in yard service at night unless the head car of the movement is lighted. The evidence shows that the practice of carriers is to the contrary and that no rule forbids it. It follows that even if it be held that the carrier violated Rule 131 on this occasion, the violation had no connection with the accident.

The Supreme Court said in the pending case and reiterated more recently in *Tennant v. Peoria etc. R. Co.*, 321 U. S. 29, that in order for an employee to recover under the Federal Employers' Liability Act for injuries suffered, he must prove not only that the carrier was negligent but also that [fol. 208] its negligence was the proximate cause of the accident in whole or in part. The plaintiff failed to meet this test insofar as the alleged violation of the Boiler Inspection Act was concerned, and on this account we think that the District Court should have withdrawn this issue from the jury's consideration. The case was submitted on two theories; one of general negligence and one of special negligence growing out of the alleged violation of the statutory rule. Under the decision of the Supreme Court there was substantial evidence to justify the submission of the first question to the jury and to support a verdict in the plaintiff's favor thereon. But in the consideration of this question the defendant was entitled to go to the jury without the stigma that its conduct was forbidden by a rule devised by governmental authority for the safety of railroad employees, and the submission of the second question was prejudicial to the defendant's case.

Furthermore, since the verdict was general, it is impossible to say whether it was based upon the issue that was properly submitted to the jury or upon the issue that should have been withdrawn. The rule to be applied in such a situation is stated in *Stokes v. United States*, 8 Cir., 264 F. 18, 23, as follows:

“* * * A general verdict under an erroneous instruction cannot be upheld, when there were two theories sub-

mitted to the jury, on either of which they might have founded it, under one of which the instruction was harmless, while under the other it was error, because the generality of the verdict renders it impossible to determine upon which theory the jury based it. They may have founded it upon the very issue to which the erroneous instruction related, and that instruction may have controlled and produced their finding. *State of Maryland v. Baldwin*, 112 U. S. 490, 493, 5 Sup. Ct. 278, 28 L. Ed. 822; *Lyon, Potter & Co. v. First Nat. Bank of Sioux City*, 85 Fed. 120, 123, 29 C. C. A. 45, 48; *Durant Mining Co. v. Percy Consolidated Mining Co.*, 93 [fol. 209] F. 166, 169, 35 C. C. A. 252, 255; *St. Louis Iron Mtn. & Southern Ry. Co. v. Needham*, 63 F. 107, 114, 11 C. C. A. 56, 62, 25 L. R. A. 853; *What Cheer Coal Co. v. Johnson*, 56 F. 810, 813, 6 C. C. A. 148, 151; *Creswell Ranch & Cattle Co. v. Martin*, 63 F. 84, 90, 11 C. C. A. 33, 39."

See also *Wilmington Star Mining Co. v. Fulton*, 205 U. S. 60.

Certain remaining questions must be considered as they may arise again on a retrial of the case. The first relates to the admissibility of a report of the accident made by the carrier's superintendent of transportation to the State Corporation Commission of Virginia pursuant to State statute, (Virginia Code §3988). Therein it was stated that Tiller stepped off a yard engine taking a cut of cars to Clopton Yard to be placed in a freight train and that he was standing on the adjacent track looking at the cars as they passed when he was hit by the head car of a back-up movement pushed by a road engine. The defendant brought out through the testimony of the superintendent and other employees that the report was not based upon their personal knowledge or upon information received from any eye witness of the accident but upon inferences drawn from what was known of Tiller's movements shortly before the accident, and the finding of his body entangled in the wheels of the head car and articles of his equipment nearby. Thus explained, the report added little or nothing to the facts in evidence.

The defendant contends, however, that the report although in the nature of an admission against interest should not have been received in evidence because the federal statute, 45 U. S. C. A. §§ 38 to 41, which requires carriers to make similar reports to the Interstate Commerce Commission expressly provides that the reports shall not be

admissible in evidence in any suit growing out of any matter mentioned therein. But this provision was omitted from [fol. 210] the Virginia enactment and does not restrict the use of the report to the State Commission; and we do not think that the Act of Congress passed under its power to regulate interstate commerce excludes the state body from the field. On the contrary, the federal statute expressly empowers the Interstate Commerce Commission to cooperate with a State Commission which is investigating an accident within its borders. There was no error in admitting the report in evidence.

In the next place the defendant contends that the court erred in that portion of its charge that related to the question whether the movement of the cars that struck Tiller was so unusual and unexpected that it became the duty of the defendant to give him an adequate warning of their approach. In substance, the court charged the jury that if they believed that the back-up movement was an unusual and unexpected one and a departure from the general practice in making up the particular train, and that Tiller had no reasonable cause to believe that such a movement would be made, it became the duty of the defendant to give him adequate warning of the movement and if the jury found that the defendant failed to perform this duty and as the result Tiller was injured, the jury should find a verdict for the plaintiff.

The evidence on the point is somewhat conflicting but there was substantial evidence to show that in making up the train in question the road engine does not usually back cars into the track on or near which Tiller was standing when he was hurt. On the other hand, there was no rule or custom which prohibited such a movement and the evidence showed that the same movement had been performed in the assembly of this nightly train on other occasions and that the track was in general use and was used for back-up movements for other purposes. Under these circumstances the railroad owed no duty to give a special warning to one [fols. 211-212] as familiar as Tiller with the local situation that the particular movement was about to take place. The instruction therefore should not have been given. The remainder of the charge sufficiently instructed the jury as to the duty of the carrier to look after the safety of its employees by exercising that degree of care which persons of

ordinary prudence engaged in the same business exercise under like circumstances.

Objections to actions of the court on other points were also made by the defendant but in our view they involve no error on the part of the court and do not require discussion at this time.

Reversed and Remanded.

[fol. 213] JUDGMENT—Filed and Entered May 15, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5217

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellant,

vs.

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Richmond, with directions to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein.

John J. Parker, Senior Circuit Judge. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, [fol. 214] U. S. Circuit Judge.

June 13, 1944, petition of appellee for a stay of the mandate is filed.

ORDER STAYING MANDATE—Filed and Entered June 13, 1944

(Style of Court and Title Omitted)

Upon the Application of the Appellee, by her counsel, J. Vaughan Gary, Esq., and for good cause shown,

It is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the Appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided said application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date. June 13, 1944.

John J. Parker, Senior Circuit Judge.

STIPULATION AS TO RECORD FOR USE ON PETITION FOR A WRIT OF CERTIORARI—Filed July 7, 1944

(Style of Court and Title Omitted)

Subject to the approval of The Supreme Court of the United States, it is hereby stipulated and agreed by and between counsel for the parties hereto that both for the purpose of consideration of the petition for writ of certiorari and for the hearing in event the petition for writ of certiorari is granted, the certified transcript of the record and the printed record shall consist of the following:

[fol. 215] 1. The joint appendix to the briefs of Appellant and Appellee filed in the United States Circuit Court of Appeals for the Fourth Circuit in this action.

2. The proceedings in and the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in this action.

3. This stipulation.

It is further stipulated and agreed that the original of plaintiff's Exhibit No. 2 shall be certified to The Supreme Court of the United States and filed in this case in that Court.

Dated at Richmond, Virginia, this 7th day of July, 1944.

Collins Denny, Jr. Counsel for Appellant. J.
Vaughan Gary, Counsel for Appellee.

[fol. 216]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the joint appendix to briefs of appellant and appellee and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on an application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 10th day of July, A. D., 1944.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

[fol. 217] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.